

REPORTS
OF
Cases Argued and Determined
IN THE
COURT of CLAIMS
OF THE
STATE OF ILLINOIS

VOLUME 10

Containing cases in which opinions were filed and orders of dismissal entered, without opinion, between July 1, 1937 and June 30, 1939, and advisory Opinions furnished Illinois Emergency Relief Commission

SPRINGFIELD, ILLINOIS
1939

{Printed by authority of the State of Illinois.}

PREFACE

The opinions of the Court of Claims herein reported are published by authority of the provisions of Section 9 of an Act entitled "An Act to create the Court of Claims and to prescribe its powers and duties," approved June 25, 1917, in force July 1, 1917.

EDWARD J. HUGHES,
Secretary of State
and Ex-officio Secretary Court of Claims.

JUSTICES OF THE COURT OF CLAIMS

C. N. HOLLERICH, *Chief Justice,*
C. H. LINSKOTT, *Judge,*
A. L. YANTIS, *Judge.*

JOHN E. CASSIDY, *Attorney General.*

EDWARD J. HUGHES, *Secretary of State and*
Ex-officio Secretary of the Court.

RULES OF THE COURT OF CLAIMS OF THE STATE OF ILLINOIS

TERMS OF COURT

RULE 1. (a) The Court of Claims shall hold a regular session of the Court at the Capital of the State on the second Tuesday of January, March, May, September and November of each year, and such special sessions as it deems necessary or proper to expedite the business of the Court.

(b) No cause will be heard at any session unless the pleadings have been settled and the evidence, abstracts, briefs and arguments of both parties have all been filed with the Clerk on or before the first day of said session.

COMPLAINT.

RULE 2. (a) Causes shall be commenced by a verified complaint which, together with four copies thereof, shall be filed with the Clerk of the Court. A party filing a claim shall be designated as the claimant and the State of Illinois shall be designated as the respondent. The original complaint and all copies thereof shall be provided with a suitable cover or back having printed or plainly written thereon the title of the Court and cause, together with the name and address of all attorneys representing the claimant. The Clerk will note on the complaint and each copy the date of filing and deliver one of said copies to the Attorney General.

(b) No person who is not a licensed attorney and an attorney of record in said cause will be permitted to appear for or on behalf of any claimant, but a claimant even though not a licensed attorney, may prosecute his own claim in person.

RULE 3. Such complaint shall be printed or typewritten and shall be captioned substantially as follows:

IN THE COURT OF CLAIMS OF THE STATE OF ILLINOIS

| | | |
|--------------------|------------|-------|
| A. B., | Claimant |) No. |
| vs. | | |
| STATE OF ILLINOIS, | Respondent | |

RULE 4. (a) Such complaint shall state concisely the facts upon which the claim is based and shall set forth the address of the claimant, the time, place, amount claimed, the State department or agency in

which the cause of action originated and all averments of fact necessary to state a cause of action at law or in equity.

(b) If the claimant bases his complaint upon a contract or other instrument in writing a copy thereof shall be attached thereto for reference.

RULE 5. (a) The claimant shall state whether or not his claim has been presented to any State department or officer thereof, or to any person, corporation or tribunal, and if so presented, he shall state when, to whom, and what action was taken thereon; and, he shall further state whether or not he has received any payment on account of such claim and, if so, the amount so received.

(b) The claimant shall also state whether or not any third person or corporation has any interest in his claim, and if any such person or corporation has an interest therein the claimant shall state the name and address of the person or corporation having such interest, the nature thereof, and how and when the same was acquired.

RULE 6. (a) A bill of particulars, stating in detail each item and the amount claimed on account thereof, shall be attached to the complaint in all cases.

(b) Where the claim is based upon the Workmen's Compensation Act the claimant shall set forth in the complaint all payments, both of compensation and salary, which have been received by him or by others on his behalf since the date of said injury; and shall also set forth in separate items the amount incurred, and the amount paid for medical, surgical and hospital attention on account of his injury, and the portion thereof, if any, which was furnished or paid for by the respondent.

RULE 7. No complaint shall be filed by the clerk unless verified under oath by the claimant, or by some other person having personal knowledge of the facts contained therein.

RULE 8. If the claimant be an executor, administrator, guardian or other representative appointed by a judicial tribunal, a duly authenticated copy of the record of appointment must be filed with the complaint.

RULE 9. If the claimant die pending the suit his death may be suggested on the record, and his legal representative, on filing a duly authenticated copy of the record of his appointment as executor or administrator, may be admitted to prosecute the suit by special leave of the Court. It is the duty of the claimant's attorney to suggest the death of the claimant when that fact first becomes known to him.

RULE 10. Where any claim has been referred to the Court by the Governor or either House of the General Assembly any party interested therein may file a verified complaint at any time prior to the next regular session of the Court. If no such person files a complaint, as aforesaid, the Court may determine the cause upon whatever evidence it shall have before it, and if no evidence has been presented in support of such claim, the cause may be stricken from the docket with or without leave to reinstate, in the discretion of the Court.

RULE 11. If it appears on the face of the complaint that the claim is barred by a statute of limitations, the same shall be dismissed.

PLEADINGS.

RULE 12. Pleadings and practice at common law as modified by the Civil Practice Act of Illinois shall be followed except as herein otherwise provided.

RULE 13. The original and four copies of all pleadings shall be filed with the Clerk and the original shall be provided with a suitable cover, bearing the title of the Court and cause, together with a proper designation of the pleading printed or plainly written thereon.

RULE 14. A claimant desiring to amend his complaint or to introduce new parties may do so at any time before he has closed his testimony, without special leave, by filing five copies of an amended complaint, but any such amendment or the right to introduce new parties shall be subject to the objection of the respondent, made before or at final hearing. Any amendments made subsequent to the time the claimant has closed his testimony must be by leave of Court.

RULE 15. The respondent shall answer within sixty days after the filing of the complaint, and the claimant shall reply within thirty days after the filing of said answer, unless the time for pleading be extended; provided, that if the respondent shall fail to so answer a general traverse or denial of the facts set forth in the complaint shall be considered as filed.

EVIDENCE.

RULE 16. After the cause is at issue the parties shall present evidence either by a stipulation of fact duly entered or by a transcript of evidence taken at such time and place as is mutually agreeable and convenient to the parties concerned. All witnesses before testifying shall be duly sworn on oath by a notary public or other officer authorized to administer oaths. If the parties are unable to agree upon a time and/or place of such hearing, application may be made to any Judge of the Court, who shall thereupon fix a time and place of such hearing.

RULE 17. All evidence shall be taken in writing in the manner in which depositions in chancery are usually taken. All evidence when taken and completed by either party shall be filed with the Clerk on or before the first day of the next succeeding regular session of the Court.

RULE 18. All costs and expenses of taking evidence on behalf of the claimant shall be borne by the claimant, and the costs and expenses of taking evidence on behalf of the respondent shall be borne by the respondent.

RULE 19. If the claimant fails to file the evidence in his behalf as herein required, the Court may, in its discretion, fix a further time within which the same shall be filed and if not filed within such further time the cause may be dismissed. Upon motion of the Attorney General the Court may, in its discretion, extend the time within which evidence on behalf of the respondent shall be filed.

RULE 20. If the claimant has filed his evidence in apt time and has otherwise complied with the rules of the Court, he shall not be prejudiced by the failure of the respondent to file evidence in its behalf in apt time, but a hearing by the Court may be had upon the evidence

filed by the claimant, unless for good cause shown, additional time to file evidence be granted to the respondent.

RULE 21. All records and files maintained in the regular course of business by any State department, commission, board or agency of the respondent and all departmental reports made by any officer thereof relating to any matter or cause pending before the Court shall be *prima facie* evidence of the facts set forth therein; *provided*, a copy thereof shall have been first duly mailed or delivered by the Attorney General to the claimant or his attorney of record.

ABSTRACTS AND BRIEFS.

RULE 22. The claimant, in all cases where the transcript of evidence exceeds fifteen pages in number, shall furnish a complete typewritten or printed abstract of the evidence, referring to the pages of the transcript by numerals on the margin of the abstract. The evidence shall be condensed in narrative form in the abstract so as to present clearly and concisely its substance. The abstract must be sufficient to present fully all material facts contained in the transcript and it will be taken to be accurate and sufficient for a full understanding of such facts, unless the respondent shall file a further abstract, making necessary corrections or additions.

RULE 23. When the transcript of evidence does not exceed fifteen pages in number the claimant may file the original and four copies of such transcript in lieu of typewritten or printed abstracts of the evidence, otherwise the original and four copies of an abstract of the evidence shall be filed with the Clerk. The original shall be provided with a suitable cover, bearing the title of the Court and cause, together with the name and address of the attorney filing same printed or plainly written thereon.

RULE 24. Each party may file with the Clerk the original and four copies of a typewritten or printed brief setting forth the points of law upon which reliance is had, with reference made to the authorities sustaining their contentions. Accompanying such briefs there may be a statement of the facts and an argument in support of such briefs. The original shall be provided with a suitable cover, bearing the title of the Court and cause, together with the name and address of the attorney filing same printed or plainly written thereon. Either party may waive the filing of his brief and argument by filing with the Clerk a written notice in duplicate to that effect.

RULE 25. The abstract, brief and argument of the claimant must be filed with the Clerk on or before thirty days prior to the first day of the session to which the cause shall stand for hearing, unless the time for filing the same is extended by the Court or one of the Judges thereof. The respondent shall file its brief and argument not later than the first day of said session, unless the time for filing the brief of claimant has been extended, in which cases the respondent shall have a similar extension of time within which to file its brief. Upon good cause shown further time to file abstract, brief and argument or a reply brief of either party may be granted by the Court or by any Judge thereof.

RULE 26. If a claimant shall fail to file either abstracts or briefs within the time prescribed by the rules, the Court may enter a rule upon him to show cause by a day certain why his claim should not be dismissed. Upon the claimant's failure to comply with such rule, the cause may be dismissed or the Court may, in its discretion, either extend the time for filing abstracts or briefs, or pass or continue the cause for the term, or determine the same upon the evidence before it.

RULE 27. If the claimant has filed abstracts and briefs, as herein provided, in apt time, and has otherwise complied with the rules, he shall not be prejudiced by the failure of the respondent to file abstracts or briefs on time, unless the time for the filing of abstracts or briefs by the respondent be extended.

EXTENSION OF TIME.

RULE 28. Where by these rules it is provided the time may be extended for the filing of pleadings, abstracts or briefs, either party, upon notice to the other, may make application for an extension of time to any Judge of this Court, who may enter an order thereon, transmitting such order to the Clerk, and the Clerk shall thereupon place the same of record as an order of the Court.

MOTIONS.

RULE 29. Each party shall file with the Clerk the original and four copies of all motions presented. The original shall be provided with a suitable cover, bearing the title of the Court and cause, together with the name and address of the attorney filing same printed or plainly written thereon.

RULE 30. Motions shall be filed with the Clerk at least five days before they are presented to the Court. All motions will be presented by the Clerk immediately after the daily announcement of the Court but at no other time during the day, unless in case of necessity, or in relation to a cause when called in course. All motions and suggestions in support thereof shall be in writing, and when the motion is based on matter that does not appear of record, it shall be supported by affidavit.

RULE 31. In case a motion to dismiss is denied, the respondent shall plead within thirty days thereafter, and if a motion to dismiss be sustained, the claimant shall have thirty days thereafter within which to amend his complaint; and, if he declines or fails to so amend, final judgment will be entered dismissing the claim.

ORAL ARGUMENTS.

RULE 32. Either party desiring to make oral arguments shall file a notice of his intention to do so with the Clerk at least ten days before the session of the Court at which he wishes to make such argument.

REHEARINGS

RULE 33. A party desiring a rehearing in any cause shall, within thirty days after the filing of the opinion, file with the Clerk the original and four copies of his petition for rehearing. The petition shall state briefly the points supposed to have been overlooked or misapprehended by the Court with proper reference to the particular portion of the original brief relied upon and with authorities and suggestions concisely stated in support of the points. Any petition violating this rule will be stricken.

RULE 34. When a rehearing is granted the original briefs of the parties and the petition for rehearing, answer and reply thereto shall stand as files in the case on rehearing. The opposite party shall have twenty days from the granting of the rehearing to answer the petition and the petitioner shall have ten days thereafter within which to file his reply. Neither the claimant nor the respondent shall be permitted to file more than one application or petition for a rehearing.

RECORDS AND CALENDAR.

RULE 35. The Clerk shall record all orders of the Court, including the final disposition of causes. He shall keep a docket in which he shall enter all claims filed, together with their number, date of filing, the name of claimants, their attorneys of record and respective addresses. As papers are received by the Clerk, in course, he shall stamp the filing date thereon and forthwith mail to opposing counsel a copy of all orders entered, pleadings, motions, notices and briefs as filed; such mailing shall constitute due notice and service thereof. Within ten days prior to the first day of each session of the Court the Clerk shall prepare a calendar of the causes to be disposed of at such session and deliver a copy thereof to each of the Judges and to the Attorney General.

RULE 36. Whenever on peremptory call of the docket any claim or claims appear in which no positive action has been taken and no attempt made in good faith to obtain a decision or hearing of the same within two years, the Court may, on its own motion, enter an order therein ruling the claimant to show cause on or before the first day of the next succeeding regular session why such claim or claims should not be dismissed for want of prosecution and stricken from the docket. Upon the claimant's failure to take some affirmative action to discharge or comply with said rule, prior to the first day of the next regular session after the entry of such order, such claim or claims may be dismissed and stricken from the docket with or without leave to reinstate on good cause shown. On application and a proper showing made by the claimant the Court may, in its discretion, grant an extension of time under such rule to show cause. The fact that any case has been continued or leave given to amend or that any motion or matter has not been ruled upon will not alone be sufficient to defeat the operation of this rule. And the Court may, during the second day of any regular session, call its docket for the purpose of disposing of cases under this rule.

RULES OF THE COURT OF CLAIMS.

MI

ORDER OF THE COURT.

It is hereby ordered that the above and foregoing rules be and the same are hereby adopted as the rules of the Court of Claims of the State of Illinois. It is further ordered that such rules shall be in full force and effect from and after the first day of January, A. D. 1934, and that the same shall be in lieu of all rules theretofore in force.

Entered this 22nd day of November, A. D. 1933.

C. N. HOLLERICH, *Chief Justice.*

C. H. LINSCOTT, *Judge.*

AUBREY L. YANTIS, *Judge.*

COURT OF CLAIMS LAW

AN ACT to create the Court of Claims and to prescribe its power and duties. (Approved June 25, 1917. L. 1917, p. 325.)

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* The Court of Claims is hereby created. It shall consist of a chief justice and two judges, appointed by the Governor by and with the advice and consent of the Senate. In any case of vacancy in such office during the recess of the Senate, the Governor shall make a temporary appointment until the next meeting of the Senate, when he shall nominate some person to fill such office; and any person so nominated, who is confirmed by the Senate, shall hold his office during the remainder of the term and until his successor is appointed and qualified. If the Senate is not in session at the time this Act takes effect, the Governor shall make a temporary appointment as in case of a vacancy.

§ 2. The term of office of the chief justice and of each judge shall be from the time of his appointment until the second Monday in January next succeeding the election of a Governor, and until his successor is appointed and qualified. This provision in reference to the term of office of the chief justice and of each judge shall apply to the current terms of said offices and the respective terms of the present incumbents shall be deemed to have begun upon the appointment of said incumbents. (As amended by Act approved and in force May 11, 1927. L. 1927, p. 393.)

EMERGENCY.] § 3. WHEREAS, in order that the full salary of said chief justice and of said judges as provided for by an Act of the Fifty-fourth General Assembly may be paid out of an appropriation made and now available therefor; therefore an emergency exists and this Act shall take effect and be in force and effect from and after its passage and approval. (Act approved May 11, 1927. L. 1927, p. 393.)

§ 3. Before entering upon the duties of the office the chief justice and each judge shall take and subscribe the constitutional oath of office, which shall be filed in the office of the Secretary of State.

§ 4. The chief justice and each justice shall each receive a salary of three thousand two hundred dollars per annum, payable in equal monthly installments. (As amended by Act approved July 8, 1933. L. 1933, p. 452.)

§ 5. The Secretary of State shall be *ex-officio* secretary of the Court of Claims. He shall provide the court with a suitable place in the capitol building in which to transact its business.

§ 6. The Court of Claims shall have power:

(1) To make rules and orders, not inconsistent with law, for carrying out the duties imposed upon it by law;

(2) To make rules governing the practice and procedure before the court, which shall be as simple, expeditious and inexpensive as reasonably may be;

(3) To compel the attendance of witnesses before it, or before any notary public or any commissioner appointed by it, and the production of any books, records, papers or documents that may be material or relevant as evidence in any matter pending before it;

(4) To hear and determine all claims and demands, legal and equitable, liquidated and unliquidated *ex contractu* and *ex delicto*, which the State, as a sovereign commonwealth, should, in equity and good conscience, discharge and pay;

(5) To hear and give its opinion on any controverted questions of claims or demand referred to it by any officer, department, institution, board, arm or agency of the State government and to report its findings and conclusions to the authority by which it was transmitted for its guidance and action;

(6) To hear and determine the liability of the State for accidental injuries or death suffered in the course of employment by any employee of the State, such determination to be made in accordance with the rules prescribed in the Act commonly called the "Workmen's Compensation Act," the Industrial Commission being hereby relieved of any duty relative thereto.

§ 7. In case any person refuses to comply with any subpoena issued in the name of the chief justice, attested by the Secretary of State, with the seal of the State attached, and served upon the person named therein as a summons at common law is served, the Circuit Court of the proper county, on application of the Secretary of the Court, shall compel obedience by attachment proceedings as for contempt, as in a case of a disobedience of the requirements of a subpoena from such Court on a refusal to testify therein.

§ 8. The concurrence of two members of the Court shall be necessary to the decision of any case.

§ 9. The Court shall file a brief written statement of the reasons for its determination in each case. In case the Court shall allow a claim, or any part thereof, which it has the power to hear and determine, it shall make and file an award in favor of the claimant finding the amount due from the State of Illinois. Annually the Secretary of the Court shall compile and publish the opinions of the Court.

§ 10. Every claim against the State, cognizable by the Court of Claims, shall be forever barred unless the claim is filed with the Secretary of the Court within five years after the claim first accrues, saving to infants, idiots, lunatics, insane persons and persons under disability at the time the claim accrued two years from the time the disability is removed.

§ 11. The Attorney General shall appear for and represent the interests of the State in all matters before the Court.

§ 12. All claims now pending in the Court of Claims created under "An Act to create the Court of Claims and prescribe its powers and duties," approved May 16, 1903, in force July 1, 1903, shall be heard and determined by the Court of Claims created by this Act in accordance with the provisions hereof.

§ 13. The jurisdiction conferred upon the Court of Claims by this Act shall be exclusive. No appropriation shall hereafter be made by the General Assembly to pay any claim or demand, over which the Court of Claims is herein given jurisdiction, unless an award therefor shall have been made by the Court of Claims.

§ 14. Repeal.

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CASES ARGUED AND DETERMINED IN THE COURT OF CLAIMS OF THE STATE OF ILLINOIS

(No. 2838—Claimant awarded \$4,000.00.)

LILLIE E. CALDWELL, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 11, 1937.

CRAIG & CRAIG, CRAIG VAN METER, FRED H. KELLY, JAMES W. CRAIG, JR., and FRANK C. WINKLER, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award for compensation for injuries resulting in death of employee may be made under.* Where employee sustains accidental injuries, resulting in his death, arising out of and in the course of his employment while engaged in extra hazardous employment, an award for compensation may be made to those entitled to, in accordance with the provisions of the Act.

MR. JUSTICE LINSOTT delivered the opinion of the court:

On the 10th day of February, 1936, claimant filed her claim with the Clerk of this Court, alleging that on the 25th day of December, 1935, Amos B. Caldwell, now deceased, was employed as a Highway Maintenance Patrolman for the State of Illinois on Route No. 133, between State Route No. 45 at Arcola, Illinois, and the intersection of State Route No. 133 with State Route No. 49; that a blizzard was in progress on said day, and said Amos B. Caldwell went to work to remove drifts from the highway, and according to the testimony, the temperature went down as low as 15 to 20 below zero; that he worked until 6:30 A. M. on December 26, 1935. He continued to work all the afternoon of December 25, 1935, until about 4:00 P. M. when his truck broke down and was taken to a garage at Arcola, but they did not have the necessary parts at Arcola, and the deceased went with another man to Mattoon, to get the necessary parts. They returned to Arcola about 2:00 A. M. on the morning of December 26th, and the weather was very cold. The deceased rested and slept in a chair in

the garage for approximately two hours. Sometime between 4:00 and 4:30 A. M., he and his helper left the garage, and he again engaged in his duties.

Claimant alleges that the deceased's death was caused by exposure and over-exertion and the severe cold weather. He had been in the employ of the State about two years and received \$1,280.00 per annum. He lived at Hindsboro, Illinois. The evidence shows that on December 24th, he had been to Paris, Illinois, attending a meeting of the maintenance supervisors and others at the District Engineer's office at Paris, Illinois. He returned to his home about 6:00 P. M. on the evening of December 24th, 1935. About 2:00 A. M., December 25th, he made arrangements for one of the helpers to go out on the highways to start working in clearing off the snow and drifts. This helper came in about noon on Christmas day, and about that time, the deceased left his home with another helper, having made arrangements with said helper about 9:00 that day. They worked until the truck broke down, the deceased having done all the driving. When the deceased and his helper had their truck repaired, they again went on the road, cleaning off the drifts that had accumulated on the highway. About 6:30 in the morning he stopped his car and made a statement to the effect that when he felt a spell coming on he did not wish to drive. He got out of the truck, walked to the rear end and back again. After he had re-entered the truck, he raised both arms as if stretching and about that time collapsed; was removed to a nearby house and apparently was dead when he was taken to the house.

Dr. J. F. Henderson of Oakland was called and he testified that in his opinion the death was caused by over-exertion and cold, which brought on an attack of angina pectoris.

The facts are not controverted. He had no children under sixteen years of age, but left a wife who was dependent upon him. The testimony shows that prior to this, the deceased had enjoyed good health, he had worked regularly and died while at work.

There might have been a diseased condition of his heart prior to the date of his death, but if that condition had been accelerated by his efforts on the preceding night and day, that would be sufficient to bring the case under the Compensation Act. This court has jurisdiction of the case; the State had

proper notice of the death of claimant's intestate, and application for adjustment was filed in apt time.

The construction and maintenance of a hard-surfaced paved public highway is the maintenance and construction of a structure under the Workmen's Compensation Act.

The deceased left a widow and no children. The amount of compensation payable in this case is determined by Section 7a, Workmen's Compensation Act, which is a sum equal to four times the average annual earnings of the employee, but not less in any event than two thousand five hundred dollars, and not more in any event than four thousand dollars.

The court finds that the deceased and the respondent were, on the 26th day of December, 1935, operating under the Workmen's Compensation Act; that on the date last mentioned above, said deceased sustained accidental injuries within the meaning of the Act, which did arise out of, and in the course of the employment; that notice of the accident was given said respondent and claim for compensation on account thereof was made on respondent within the time required by the provisions of the Act; that the earnings of the deceased during the year next preceding the injury were \$1,280.00, and that the average weekly wage was \$24.62.

That the deceased at the time of the injury was 55 years of age and had no child under sixteen years of age.

That the petitioner is entitled to recover compensation in the sum of \$4,000.00; that the said petitioner is now entitled to have and receive from the respondent the sum of \$882.80, being the amount of compensation that has accrued from the 27th day of December, 1935, to the 12th day of May, 1937; and the further sum of \$3,117.20 to be paid to her at the rate of \$12.31 per week, payable every two weeks until fully paid, all of which is subject to the approval of the Governor of Illinois.

This award being subject to the provisions of an Act entitled "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," approved July 2, 1935 (Sess. Laws of 1935, Page 49) and being, by the terms of such Act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from the Road Fund in the manner provided for in such Act.

1 COMMERCIAL ACETYLENE SUPPLY CO. INC. v. STATE OF ILLINOIS.

(No. 3031—Claimant awarded \$42.32.)

COMMERCIAL ACETYLENE SUPPLY CO. INC., Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed July 1, 1937.

Claimant, pro se.

OTTO KERNER, Attorney General; MURRAY P. MILNE, Assistant Attorney General, for respondent.

CONTRACT—money due under—when award made for. Where it appears that State is indebted for demurrage, under contract, and bill therefor, which is not questioned, was submitted within a reasonable time, and without fault or neglect of claimant, same is not approved for payment before lapse of appropriation out of which it could be paid, an award may be made for amount due where at the time obligation was incurred there were funds remaining in appropriation to pay same.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

From the stipulation of facts herein it appears that claimant was awarded a contract to furnish oxygen and acetylene gas for the use of the respondent at Lincoln State School and Colony from July 1st, 1934 to June 30th, 1935.

The contract provided for a demurrage charge of two cents (2c) per day on all cylinders held beyond an initial thirty-day period. During the term of the contract, cylinders were held beyond the thirty-day period for a total of 2,116 days.

At the close of each month claimant rendered a statement of the amount due it for such demurrage charges, but none of such items were vouchered for payment, and no payment has been made therefor.

The appropriation from which such items were payable lapsed September 30th, 1935, at which time there remained an unexpended balance of such appropriation sufficient to pay the claimant's account.

From the facts stipulated it appears that under the terms of its contract, claimant is entitled to the amount claimed. It presented its statements promptly, and the failure to approve the same and voucher them for payment was not the result of any negligence on the part of the claimant. The evidence shows that there was an unexpended balance in the proper appropriation at the time the same lapsed, sufficient to pay

the amount of claimant's demand, and under the repeated decisions of this court, claimant is entitled to an award.

Award is therefore entered in favor of the claimant for the sum of Forty-two Dollars and Thirty-two Cents (\$42.32).

(No. 1902—Claimant awarded \$300.00.)

VERNE FIEDLER, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed July 1, 1937.

CLARENCE B. DAVIS, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award may be made for.* An award may be made for personal injuries suffered by a member of the Illinois National Guard, when sustained while in the performance of his duties as such member, under authority of Section 11 of Article 16 of Military and Naval Code.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Prior to and on August 5th, 1931 claimant was a member of Troop G, 106th Cavalry, Illinois National Guard, and on that date, while his Company was at Camp Grant, and while he was participating in troop maneuvers, claimant was thrown from his horse and sustained injuries to his left ankle. He was immediately taken to the field hospital at Camp Grant, and shortly thereafter was taken to St. Anthony's Hospital at Rockford, where a cast was applied to his foot and the lower part of his leg. He was returned to the field hospital the next day, and remained at such hospital until his troop returned home, about ten days thereafter. Upon his return home claimant was placed under the care of Dr. Lockie, one of the medical officers of the National Guard, who continued to treat him for his injuries. Claimant saw Dr. Lockie several times a week for the first three months after his injury and thereafter every month or two until about a year after the accident. The testimony indicated that the cast was not properly applied in the first instance, but same was not entirely removed until about seven weeks after the accident. During the time the cast was on his leg, claimant moved about

with the aid of crutches; after the cast was removed he used a cane until about November 1st, 1931.

Claimant was eighteen years of age at the time of the accident and had attended high school during the school year prior to his injury, but had worked during the preceding year. He started back to school again at the opening of school after his injury, but on account of difficulty in carrying books, getting up and downstairs on crutches, and otherwise moving about, he quit after about a week. His condition was such that he could have attended school at the opening of the February, 1932, semester, but other reasons prevented him from doing so, and he did not thereafter return to school.

A Board of Medical Examiners was convened at Hines Hospital on November 10th, 1931 to consider claimant's case, and such Board made the following findings:

"An examination of the left ankle reveals a slight enlargement of both the internal and external malleoli, particularly the internal. There is slight soft tissue thickening over the ankle but not sufficient to pit from pressure. The patient dorsal flexes the left ankle to a normal range. Plantar flexion is limited very slightly in the extreme. Abduction and adduction (turning out and in of ankle) of the left ankle is possible to one-half of the normal range. There is no actual shortening of the left lower extremity. No atrophy of the muscles. One-half inch increase in the circumference of the left ankle as compared with the right. The longitudinal arches of both feet are depressed to the second degree with pronation. The toes are normal. The condition of the arches does not produce symptoms at this time.

"Functionally, the results of the treatment are good; patient has no permanent residual disability. No further treatment is indicated for this condition. Diagnosis: Fracture Left Astragalus, Recent, Healed.

"Recommendations: It is the opinion of the Board that this patient's ankle now has reached the point where the soldier can resume his regular employment."

Claimant did not procure regular employment until a year and a half or two years had elapsed from the date of the injury, but the evidence does not show that the failure to procure employment resulted wholly from his physical condition.

He is now employed as a musician, and testified that his foot still bothers him, particularly after strenuous exercise or after walking several miles.

Dr. Lockie died prior to the taking of testimony herein, and no record of his treatment or findings is in evidence.

Doctor bills in the amount of \$48.00 were paid by the respondent, and claimant was also paid \$178.00 for approxi-

mately three months' compensation pursuant to the provisions of Section 10 of Article 16 of the Illinois Military and Naval Code.

Section 11 of Article 16 of the Military and Naval Code of this State provides that in every case where an officer or enlisted man of the National Guard shall be injured while performing his duty in pursuance of orders from the Commander-in-Chief, such officer or enlisted man shall have a claim against the State for financial help and assistance, and the State Court of Claims shall act on and adjust the same as the merits of each case may demand.

Claimant was injured while performing his duty in pursuance of orders from the Commander-in-Chief, and therefore has a claim against the State for financial help or assistance, and the only question for this court to determine is the question as to whether claimant has already been fully compensated for the injuries so sustained by him, or whether the merits of the case entitled him to further compensation.

Under all of the evidence, we feel that the injury sustained by claimant, the disability resulting therefrom, and the resulting loss of wages, entitle him to additional compensation, and in our judgment the payment of an additional sum of Three Hundred Dollars (\$300.00) will fully compensate him therefor.

Award is therefore entered in favor of the claimant for the sum of Three Hundred Dollars (\$300.00).

(No. 3059---Claim denied.)

JOSEPH PUDENZ, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed August 18, 1937.

Claimant, pro se.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

ILLINOIS LIQUOR CONTROL LAW—license issued under—claim for refund of unearned portion of fee, where licensee disposes of business—when award for denied. The facts in this case are almost identical with those in *Yott vs. State*, No. 3035, and the opinion in that case is controlling herein.

MR. JUSTICE YANTIS delivered the opinion of the court:

A stipulation filed herein discloses that claimant, on April 30, 1936 made application to respondent for a license as a

wholesale malt liquor dealer, for the period from May 1, 1936 to June 30, 1937, for which he voluntarily paid the sum of One Hundred Sixteen and 67/100 (\$116.67), being the proper fee for a license as a distributor for such period of time.

That on May 11, 1936 the Illinois Liquor Control Commission issued the desired license upon such application and deposit. That on May 15, 1936 claimant sold and disposed of his business, and notified the commission to that effect, and requested a refund of that portion of the fee which he had paid, for the period from July 1, 1936 to June 30, 1937, to wit One Hundred (\$100.00) Dollars; further, that during the period from April 30, 1936 to May 15, 1936 claimant continued to be engaged in said business. Claimant predicates his claim upon the fact that had he desired to do so he could have applied for a license for a two-months period expiring June 30, 1936, or for a period of fourteen months, expiring June 30, 1937, such option being given to the applicant under the terms of the Illinois Liquor Control Act as amended, effective July 1, 1935.

The Attorney General has filed a motion to dismiss the claim for the reason that the law makes no provision for a refund of a portion of such license fee on the ground that plaintiff had disposed of his business and no longer required such license.

Claimant's election to apply for a fourteen-months license instead of a two-months license was a matter of his own decision. He voluntarily expressed his option in favor of the license for the longer period, and the fact that he later saw fit to sell his business does not in the absence of a statute authorizing such refund, justify the court in granting an award. The Illinois Liquor Control Act authorizes refunds where the application is denied; where the licensee dies or becomes bankrupt; or where the political sub-division in which he is licensed becomes prohibition territory. The fact that an applicant after operating for a time sees fit to surrender the privilege granted by such license, does not justify a refund in the absence of a statutory provision. A similar ruling is found in the case of William H. Yott, No. 3035, denied at the present term.

The motion of the Attorney General is allowed and claim dismissed.

(No. 3059--Claim denied.)

OPPENHEIMER CASING COMPANY, Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed August 18, 1937.

Claimant, pro se.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

MOTOR VEHICLE LICENSE FEE—*based on information submitted by claimant -- claim for refund of overpayment--when award for denied.* When the amount of a motor vehicle license fee is correctly computed and assessed in accordance with law, based on information submitted by payer, claim for refund of a part thereof alleged to have been excessive, on account of error in information submitted by payor, will be denied.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks an award for an alleged overpayment of Four (\$4.00) Dollars which he paid for automobile license for a Plymouth car for the year 1935. In making its claim, plaintiff recites that "in applying for a license for this automobile, the H. P. was erroneously indicated as being 25.35 which necessitated payment of a higher fee . . . Further, that the correct H. P. should have been stated as 23.44." The registration fee was assessed on the basis of the statements made in the application, and the license fee submitted by claimant was accepted in connection with such application and license duly issued. Claimant now seeks an award for the Four (\$4.00) Dollars as such alleged overpayment.

Where no objections have been interposed claims of a similar nature have at times been allowed. Respondent herein moves to dismiss this claim for the reason that it appears on the face of said claim that such registration fee was based upon a statement of facts, made by claimant, upon which the Secretary of State was justified in relying; that such payment was not made under protest, and that the fee was assessed correctly on the basis of the application made.

When the amount of a tax or fee is correctly computed and assessed in accordance with law *based on information submitted by claimant*, claim for refund, of a part thereof alleged to have been excessive, on account of error in the information submitted by claimant, will be denied. *Seth Seiders, Inc. vs. State, 7 C. C. R. 9.*

Under the objection interposed by respondent, the motion to dismiss is hereby allowed and claim dismissed.

(No. 3957-- Claim denied.)

PERCY MONAHAN, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed August 19, 1937.

LEOPOLD SALTIEL, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

NEGLIGENCE--*employees of State Penal Institution--State not liable where inmate injured as result of.* The State is not liable to respond in damages for personal injuries sustained by inmate of penal institution as the result of the negligence of employees of such institution, as in the conduct of its penal institutions it exercises a governmental function and is not liable for the negligence of its servants or agents, the doctrine of respondent superior not being applicable to the State in the exercise of its governmental functions.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant filed his complaint herein on February 18th, 1937, and alleges therein in substance that on March 23d, 1936 he was an inmate of the Illinois State Penitentiary at Joliet; that he was a member of the prison band, and on the last mentioned date was assembled with said band in the dining room of the penitentiary; that he was then and there in the exercise of all due care and caution for his own safety; that one of the guards stationed in said dining room carelessly, negligently and improperly handled a certain gun, whereby the same was discharged and the bullet therefrom struck the claimant in the leg, and as the result thereof he sustained serious and permanent injuries, for which he asks compensation.

The Attorney General has filed a motion to dismiss the claim on the ground that the doctrine of respondent superior does not apply to the State in the operation of its penal institutions, and that therefore there is no liability on the part of the State for the injuries sustained by the claimant.

This court has repeatedly held that in the management and operation of its charitable and penal institutions, the

State is engaged in a governmental function, and has also repeatedly held that in the exercise of its governmental functions, the State is not liable for the negligence of its servants and agents under the doctrine of respondent superior in the absence of a statute making it so liable. *Schwab vs. State*, 4 C. C. R. 77; *Burghardt vs. State*, 5 C. C. R. 221; *Pelka vs. State*, 6 C. C. R. 390; *Sturrock vs. State*, 7 C. C. R. 157; *Parks vs. State*, 8 C. C. R. 535; *Schaefer vs. State*, No. 1968, decided at the September, 1935, term of this court; *White vs. State*, No. 2859, decided at the May, 1936, term of this court; *Edward Shilkitis vs. State*, No. 2355, decided at the January, 1937, term of this court; *Henry F. Meyers vs. State*, No. 2782, decided at the present term of this court.

There being no liability on the part of the State if the State were suable, we have no authority to allow an award. *Crabtree vs. State*, 7 C. C. R. 207.

The motion of the Attorney General to dismiss the case must therefore be sustained. Motion to dismiss allowed. Case dismissed.

(No. 2876—Claimant awarded \$3,300.00.)

ALTA SULLIVAN, AN INSANE PERSON, JOHN SULLIVAN, A MINOR AND WILLIAM SULLIVAN, A MINOR, ALL APPEARING BY MARY SULLIVAN, THEIR NEXT FRIEND, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 15, 1937.

DOWNING, GUMBART & GRIGSBY, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—dependent under, mentally incapacitated—claim for compensation—limitation of time for—does not begin until appointment of conservator or guardian. Where wife, a dependent of employee of State, who sustained accidental injuries, resulting in his death, arising out of and in the course of his employment, while engaged in extra hazardous employment, was at the time of such injuries and death, mentally incapacitated, and had no guardian or conservator, she is not barred from making application for compensation after the expiration of one year after such death, as the limitation as to time, for such application, in such case under Section 24 of the Act does not begin to run until the appointment of a conservator or guardian, and such conservator or guardian make such application within one year from date of such appointment.

SAME: when injury deemed to have arisen out of and in the course of employment--when award not to be made for. Where it appears that employee, while engaged in extra hazardous occupation as defined in Act, sustained accidental injuries resulting in his death, and that at the time of such accident he was at the immediate place where his labors were to be performed, on the premises of his employer, traveling a natural and permissible course, included in the field of his labor and at the exact moment of his death was receiving instructions from his superior as to the performance of his duties, such injuries must be held to have arisen out of and in the course of his employment and an award for compensation may be made to those entitled thereto, in accordance with the provisions of the Act.

MR. JUSTICE YANTIS delivered the opinion of the court:

On May 5, 1933 Herman J. Arnold, Administrator of the Estate of Ambrose Sullivan, deceased, filed his complaint in the Court of Claims, seeking an award of Ten Thousand (\$10,000.00) Dollars for the accidental death of Ambrose Sullivan. The complaint was drawn as an action of trespass on the case, but plaintiff changed his prayer for relief and sought an award under the provisions of the Workmen's Compensation Act of Illinois.

The Attorney General contended that claimant was not entitled to recover for the following reasons:

1. That no claim for compensation had been made within six months after the accident as required by Section 24 of the Workmen's Compensation Act.

2. That the accident in question did not arise out of the employment of said decedent.

The record failing to disclose compliance with Section 24, the award was denied and the claim dismissed. The opinion appears as claim No. 2171, 8 C. C. R. P. 399.

On April 1, 1936 Alta Sullivan, an insane person and widow of Ambrose Sullivan, and John Sullivan and William Sullivan, minor children of Ambrose Sullivan, filed the present claim, by Mary Sullivan, their next friend, and herein seek an award under the terms of the Workmen's Compensation Act for the death of Ambrose Sullivan.

By a stipulation between the attorneys for the respective parties, all evidence, stipulations, briefs and arguments in the former case, No. 2171, are accepted as a part of the record in the present case. In addition thereto, testimony was taken as to the insanity of Alta Sullivan, surviving widow. Claimants herein allege that the insanity of Alta Sullivan and the fact of the minority age of said children creates an exception

as to each in regard to the time limit stated in Section 24 of the Workmen's Compensation Act.

The Attorney General interposes the following objections:

1. Jurisdiction of claim by this court in the absence of compliance as to notice required by Section 24 of the Workmen's Compensation Act.

2. Whether the adjudication in Claim No. 2171 is as to this claim, *res adjudicata*?

3. Did the injury to Ambrose Sullivan arise out of and in the course of the latter's employment?

4. Amount of compensation, if any, payable to claimants.

A condensed statement of facts as found in the former opinion and the additional evidence taken herein is as follows:

For about eight days prior to the 16th day of June, A. D. 1932, Ambrose Sullivan had been employed by respondent in mowing weeds on S. B. I. Routes Nine (9), Three (3) and Ninety-five (95) in McDonough County, under the supervision of Jesse Walters, Highway Maintenance Superintendent. Sullivan lived about two miles north of Macomb, and was the owner of a team of horses and a mower which he used in his said work. For the first few days of his employment he worked near his home, and drove the team home at the end of the day's work. After the first few days, he was at some considerable distance from his home at quitting time, and on those days he left his team and mower with some farmer who lived near the place where he stopped work, and rode home with Mr. Jesse Walters, the Maintenance Superintendent, and the next morning he would come out with his Maintenance Superintendent to the place where he left his team the night before. The matter or custom of riding back and forth with the Maintenance Superintendent was not a part of the contract, but was a sort of mutual arrangement or understanding between them. The same custom existed with other men who were also employed in mowing weeds. The mowers ordinarily worked nine hours a day, usually commencing at seven o'clock A. M. and quitting at five o'clock P. M. Sometimes they started a little before seven or a little after seven, but they aimed to start work at seven o'clock. Their time

commenced when they got on the job. On a wet morning their time commenced when the weeds were dry enough to mow.

On June 15th, 1932 Sullivan was about seven miles from his home when he quit work. He left his team and mower with a farmer living about forty rods north of S. B. I. Route 95, and rode home with his Maintenance Superintendent.

The next morning the Maintenance Superintendent in driving out to work met Sullivan about one-half mile from his (Sullivan's) house, and stopped to pick him up. The Maintenance Superintendent was driving a small pick-up truck with a single seat, and there were two men riding in the seat with the driver. Sullivan rode in the back of the truck, which went north on Route 3 to the junction and then east on Route 95, to a point about seven miles from Macomb where the Maintenance Superintendent stopped the truck so that Sullivan could get out and get his team and mower. Sullivan got out and started across the road to the north. Just then Mr. Walters, the Maintenance Superintendent, called to him and he came back. In this connection Mr. Walters testified:

"It had come a rain the day before and we were in doubts whether it was going to dry enough to go on mowing. After he got out I spoke to him, and I said, 'Mr. Sullivan, you can use your own judgment about when to start.'"

Homer B. Carey, the only other witness who testified as to this conversation, said:

"Mr. Sullivan got out and started across the road and Jesse hollered at him and called him back and told him that it was too wet, we wouldn't hitch up for about two hours until it got a little dryer."

After this conversation, Sullivan started back across the road again to the north. Just then one Keith Sapp who was also driving east on said Route 95, approached the State truck, and turned to the left to pass it just as Sullivan was crossing the road the second time. Sapp turned further to the left to avoid an accident, but Sullivan evidently became confused, and ran into the side of Sapp's car, whereby he was thrown to the pavement, and sustained injuries from which he died while being taken to the hospital.

Sullivan left him surviving his wife and four children, two of whom were under sixteen years of age at the time.

Sullivan's earnings were eighty-five cents (85c) per hour for himself, team and mower, of which amount forty cents (40c) was regarded as his for his individual services and the balance for the team and mower.

The shock of the death of Ambrose Sullivan apparently upset the mental condition of his wife, Alta Sullivan, and from that time forward her mental disability increased. Right after the accident she was placed in St. Francis Hospital at Macomb for a brief time because of her mental condition, and eventually on April 29, 1934 she was adjudged insane in a proceeding of the County Court of McDonough County, Illinois. She was released on furlough as an improved patient in September, 1934, but never recovered her normal mentality and was again recommitted to the State Hospital at Peoria, and was under confinement at the latter place at the time of taking the evidence in this cause. Dr. Joseph H. Davis of Macomb testified that he attended Mrs. Sullivan; that at the time of the death of her husband "she went all to pieces and got very bad mentally—so bad, that we finally had to adjudge her insane and take her away. It all seemed to be due to worry over the death of her husband . . . I was one of the commission that examined her at the time she was adjudged insane . . . Prior to that we tried to control her by giving her sedatives . . . I do not think that she was capable of transacting any business of a serious nature at any time after the death of Mr. Sullivan." Alta Sullivan has never remarried. The child, William Sullivan, was born March 4, 1920 and John Sullivan was born January 7, 1918. All were dependent upon Ambrose Sullivan at the time of his death and are now living.

The first objection by respondent is as to the jurisdiction of the court.

It is apparent from the record that Ambrose Sullivan and respondent were both within the terms of the Workmen's Compensation Act at the time of the latter's death, and that under the terms of *Paragraph 6, Section 6* of the *Court of Claims Act* this court has jurisdiction of Workmen's Compensation Claims arising out of accidents to State employees. The first material question is, "Are Claimants herein barred under Section 24 of the Act because of failure to file notice of claim within six months after the accident, and for failure to file application for compensation within one year after the date of the death of Ambrose Sullivan?" While such time limits definitely apply to compensation claims in general, said Section 24 contains the further provision,

"That in case of mental incapacity of any dependent of a deceased employee who may be entitled to compensation under the provisions of this Act, the limitations of time by this Act provided shall not begin to run against said mental incompetents until a Conservator or Guardian has been appointed."

Claimant contends that under the showing made in the record as to the mental disability of Alta Sullivan, surviving widow of Ambrose Sullivan, the running of the statute has been tolled as against her, under the specific exception recited in Section 24 of the Workmen's Compensation Act, and that inasmuch as the children, William Sullivan and John Sullivan, were minors and under the age of sixteen years at the time of their father's death, a proper construction of said Section 24 should also grant to them an exception as to compliance with the requirements of such section in the matter of time limitations.

The question as to the latter exception is not material under the decision of this case, for if an award is granted it will be granted to the mother and if so granted, then under the terms of *Section 7 (b-2)* the award provided for in *Section 7 (a)* of a sum equal to four times the average annual earnings of the employee and not more in any event than Four Thousand (\$4,000.00) Dollars is increased by said *Section 7 (b-2)* to a possible maximum of four times the average annual wages plus \$450.00.

The evidence in the record sufficiently establishes the fact that Alta Sullivan suffered from mental incapacity from the time immediately following the death of her husband. The Doctor's evidence and the records show that she became a mental patient in a local hospital very shortly thereafter, has been committed and recommitted to one of the State Institutions for the insane, and is now so confined; further, that no Conservator has ever been appointed for her. We therefore find that the statute of limitations has not run against Alta Sullivan; and that the court has jurisdiction of the parties and the subject matter hereof.

Upon the second objection, i. e. whether the adjudication in Claim No. 2171 is as to this claim *res adjudicata*, the court finds—that the former action was brought by Herman J. Arnold as Administrator of the Estate of Ambrose Sullivan, deceased; that the parties plaintiff are not the same.

"The requisites of a judgment pleaded as a bar in general require that a plea of *res adjudicata* cannot prevail unless there is a concurrence of

four elements; identity in the thing sued for; identity in the cause of action; identity of persons and of parties to the action; identity of quality in the persons for or against whom the claim is made."

34 C. J. p. 752, *Judgments, Par. 1162.*

"A judgment for defendant on the ground that the court is without jurisdiction is not a bar to a subsequent action."

34 C. J. p. 776, *Judgments, Par. 1194.*

We therefore find that the former case of *Arnold, Administrator, etc. vs. State*, C. C. R. No. 2171 is not res adjudicata as to the present claim.

The second material question then is, "Did the injury arise out of and in the course of the employment?"

Ambrose Sullivan was engaged as a laborer to mow weeds along the improved highway of the State of Illinois known as S. B. I. No. 95; on the 23rd day of June, A. D. 1932 he was struck by an automobile traveling on said highway; said accident occurred at the cross-roads where his actual work was to begin. At the time of the accident he was on the premises of respondent, and at the scene of his employment. The accident happened at approximately 7 o'clock A. M. just before Sullivan was to enter upon his day's labors. He had ridden to the point in question in a State owned truck driven by Jess Walters, Highway Superintendent in charge of maintenance work at said point. The team and mower that Sullivan had previously used and with which he was to resume operations on the morning in question were at a farm one-fourth mile down the dirt highway that intersected with S. B. I. Route No. 95. He alighted from the truck at the intersection and started across the road, just as Keith Sapp approached from the rear in his own automobile; both cars were going east; Sapp pulled to the left to go around the State truck and blew his horn. Sullivan came around from the back of the truck and ran across on the slab in front of Sapp's car. The latter pulled off the pavement on the left-hand side of the road until he was entirely off the slab. Notwithstanding this, the car side-swiped Sullivan and he died from the effect of the injury received.

An issue is raised in the record as to whether Sullivan's employment had begun at the time of the accident, or whether he was still on his way to such employment; and if the latter whether he was on the premises of respondent, en route to his employment, and thereby entitled to recover for injuries received, under the terms of the Workmen's Compensation Act.

The fact that he was riding in a truck owned by the State is not material, for the evidence shows that transportation from town to the scene of his daily labors was not included under the terms of his employment, but was in fact a mere accommodation extended him by his superior, Mr. Walters. At the time of the accident however, Sullivan had in fact arrived at the actual point where his labor was to be performed. His employment consisted of mowing weeds. His scale of pay was Forty Cents (40c) per hour when individually employed; Seventy Cents (70c) per hour for his services with his team and Eighty-five Cents (85c) per hour when he used his team and mower. On the morning in question he was to have obtained his team and mower at a point one-fourth mile up the dirt road from the intersection where he was killed, and had the accident not resulted he would have returned with the team and mower to the point where he alighted from the truck. His fellow employee, Homer B. Carey, testified that when Sullivan got out of the truck and started across the road, his Superintendent Walters "hollered at him and called him back, told him it was too wet; we wouldn't hitch up for about two hours until it got a little dryer." He started back across the road and he run into this car of Sapp's and was killed." He further testified, that he believed the reason Sullivan did not see the approaching car was because his attention was directed to Mr. Walters, when the latter called him back.

Jesse Walters testified "We stopped to let Sullivan out . . . after he got out I said 'Mr. Sullivan you can use your own judgment about when to start' . . . he was back of the truck then. His time was to start that morning whenever the grass or weeds were dry enough to mow . . . we always aimed to start the time at 7 o'clock, but a morning like that when it was wet we didn't know when we would get started."

In the case of *Indian Hill Country Club vs. Ind. Comm.* 309 Ill. 271, a caddie twelve years old had waited near the Club House, until it was evident his services would not be needed. He was leaving the grounds but still on the premises when injured. The court said—

"It is not essential to the right to receive compensation that the employee should have been working at the particular time when the injury was received. The employment is not limited to the exact moment when he begins work and when he quits work. An injury accidentally received on the

premises of the employer by an employee while going to or from his place of employment by a customary or permitted route within a reasonable time before or after work, is received in the course of and arising out of the employment."

"Whether the exact hour of seven o'clock had arrived or whether it was a few minutes either before or after seven is not material so long as a substantial and reasonable compliance with the employer's requirements is shown."

Union Starch Co. vs. Ind. Comm., 344 Ill. 77.

At the time of the accident in question Sullivan was on the premises of his employer; was at the immediate place where his labors were to be performed; was to determine the exact moment when his actual labor should start; was traveling a natural and permissible course included in the field of his labor, and at the exact moment of his death was receiving instructions from his superior as to the performance of such duties. We believe the record sufficiently discloses that the accidental injuries resulting in the death of Ambrose Sullivan arose out of and in the course of his employment, within the meaning of the Workmen's Compensation Act.

The remaining question is the amount of compensation to which claimant is entitled.

Section 7 (a) of the Workmen's Compensation Act provides—

"The amount of compensation which shall be paid for an injury—resulting in death shall be:

(a) If the employee leaves any widow, child or children, whom he was under legal obligation to support at the time of his injury, a sum equal to four times the average annual earnings of the employee, but not less in any event than \$2,500.00 and not more in any event than \$4,000.00."

Section 7 (h-1), Workmen's Compensation Act.

"Whenever in paragraph (a) of this section a minimum of \$2,500.00 is provided, such minimum shall be increased to the amount: \$3,100.00 in case of two children under the age of sixteen years at the time of the death of the employee."

Section 7 (h-2), Workmen's Compensation Act.

"Whenever four times the average annual earnings of the deceased employee as provided in paragraph (a) of this section amounts to more than \$2,500.00 and to less than \$4,000.00, the amount so payable under said paragraph shall be increased as follows: In case such employee left surviving him two children under the age of sixteen years, the amount so payable shall be increased \$450.00."

While Ambrose Sullivan was receiving Eighty-five (85c) Cents per hour for his own labor and that of the use of his team and mower, the evidence shows that his individual wages were Forty (40c) Cents per hour on the basis of a nine-hour a day, and being intermittently hired would become within the

rule of two hundred (200) days per year, thus making his average annual earnings Seven Hundred Twenty (\$720.00) Dollars. Four times thereof is Two Thousand Eight Hundred Eighty (\$2,880.00) Dollars. Claimant contends for an allowance of Three Thousand One Hundred (\$3,100.00) Dollars under the provisions of *Section 7 (h-1)*. Counsel for respondent contend that the allowance, if any, should be only in the amount of Two Thousand Eight Hundred Eighty (\$2,880.00) Dollars, and that no allowance for the children under sixteen years of age is justified for the alleged reason that a claim by the children is barred by the limitations of *Section 24* of the *Workmen's Compensation Act* and that it would be an anomalous situation if additional compensation would be paid to those who are not legal claimants.

As has heretofore been noted, the surviving widow being recognized as a proper claimant, the amount payable to her is determined by the fact as to whether the injured employee did or did not leave dependent children under the age of sixteen years at the time of his death, and while the amount of such increased payment, if any, may under the provisions of *Section 7 (g)* be divided among the surviving widow and such children as the court may deem best, such award in the first instance is in fact made to the surviving widow. As expressive of the court's opinion in the matter however, we believe under the authority of *McDonald vs. City of Spring Valley*, 285 Ill. 52 and *Walgreen Co. vs. Ind. Comm.* 323 Ill. 194, that notwithstanding the fact that the *Workmen's Compensation Act* provides in general in *Section 24* for certain limitations of time, that such limitations do not run against minors of tender years, and that a construction of such Act in connection with the well known rules of law pertaining to the rights of minors and the tolling of statutes of limitations pertaining to them, would preclude the limitations of *Section 24* from applying to such minors. As stated in the former case "The recognition by the law, of the status of infants, and of their exemption up to a certain age from liability under the law, is so well known that it must be presumed that the legislature, in enacting such a statute as the one under consideration, did not intend by the general language used to include within its provisions a class of persons which the law has universally recognized to be utterly devoid of responsibility." However, in the present case as stated above, the award is being allowed

because the surviving wife is a proper claimant, and the amount of the award is fixed by the number and status of the dependents left surviving. Under the construction given the several provisions of Section 7 of the Workmen's Compensation Act, in the case of *Moweaqua Coal Corporation vs. Ind. Comm.* 360 Ill. 194, the amount of compensation due in the present case is fixed by Section 7 (h-2). The annual wages of Seven Hundred Twenty (\$720.00) Dollars multiplied by four equals Two Thousand Eight Hundred Eighty (\$2,880.00) Dollars, and that being more than Two Thousand Five Hundred (\$2,500.00) Dollars and less than Four Thousand (\$4,000.00) Dollars, the allowance is increased under the terms of Section 7 (h-2) the sum of Four Hundred Fifty (\$450.00) Dollars, or a total of Three Thousand Three Hundred Thirty (\$3,330.00) Dollars.

We find that the persons who form the basis for determining the amount of compensation to be paid, and the respective shares to be so paid, in proportion to their respective dependencies are as follows:

| | |
|--|------------|
| Allowance, account Alta Sullivan, surviving wife..... | \$2,880.00 |
| Allowance, account John Sullivan and William Sullivan, surviving children under sixteen years of age..... | 450.00 |
| | <hr/> |
| | \$3,330.00 |

An award is hereby allowed in favor of claimant Alta Sullivan by Mary Sullivan, her next friend in the sum of Three Thousand Three Hundred Thirty (\$3,330.00) Dollars; Four Hundred Fifty (\$450.00) Dollars of which is allowed because of the survivorship of John Sullivan, age fourteen years at the time of his father's death, in June, 1932, and William Sullivan, age twelve years at that time.

It is ordinarily contemplated that a surviving parent will use a substantial part of funds received, for care and support of the minor children. In view of the conservatorship required for Alta Sullivan, it seems equitable and best under the authority of said *Section 7 (g)* of the Act, for the court to order payment of said award of Three Thousand Three Hundred Thirty (\$3,330.00) Dollars, as follows, to-wit:

- One-third payable to the Conservator of Alta Sullivan.
- One-third payable to the Guardian of William Sullivan.
- One-third payable to the Guardian of John Sullivan.

IT IS THEREFORE ORDERED that immediate warrants be issued as follows, to-wit:

| | |
|--|------------|
| To the Conservator of Alta Sullivan for..... | \$1,072.00 |
| To the Guardian of William Sullivan for..... | 1,072.00 |
| To the Guardian of John Sullivan for..... | 1,072.00 |

and that future monthly warrants be issued to said conservator and guardians respectively for payments of Four (\$4.00) Dollars per week each, commencing with the week ending August 29th, and continuing until each of said three persons have respectively received the further sum of Thirty-eight (\$38.00) Dollars.

This award being subject to the provisions of an Act entitled, "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," Approved July 3, 1937 (Sess. Laws 1937, p. 83) and being, by the terms of such act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from such appropriation from the Road Fund in the manner provided for in such Act.

(No. 2786—Claim denied.)

HANDY BUTTON MACHINE COMPANY, Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed September 15, 1937.

STAVINS & PERLMAN, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

FRANCHISE TAX—amount paid in excess of that due—owing to error of Secretary of State—paid without protest and with full knowledge of facts—is voluntary payment—refund of amount paid, claimed in excess of that due—remedy available to claimant—failure to avail of—bars award. The same question involved herein was before the court in the case of Butler Company vs. State, 9 Court of Claims Reports, page 503 and the opinion in that case is controlling herein.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

An opinion was filed in above matter on February 10th, 1937; rehearing was allowed, and upon rehearing, the following opinion is substituted for the original opinion herein:

Claimant filed its complaint herein on December 28th, 1935, and therein asks an award in the amount of \$87.50 on account of an annual overpayment of franchise tax in the

amount of \$12.50 for the years 1927 to 1933, both inclusive.

Section 10 of the Court of Claims Law provides that every claim against the State cognizable by the Court of Claims shall be forever barred unless the claim is filed with the Secretary of the Court within five years after the claim first accrues. The complaint herein was filed December 28th, 1935, and we are therefore limited to a consideration of the overpayments claimed to have been made by claimant subsequent to December 28th, 1930.

From the evidence in the record it appears that for the years 1931, 1932 and 1933 claimant duly filed its annual report with the Secretary of State on the forms prepared by such secretary; that each of such reports listed the total amount of capital stock issued at \$225,000.00; that in each of such years (1931, 1932 and 1933) claimant was assessed and paid an annual franchise tax in the amount of \$125.00.

It is admitted that on the basis of such annual reports, claimant should have been assessed and required to pay an annual franchise tax in the sum of \$112.50, to-wit, \$12.50 less than it actually paid, and that the error was the result of inadvertence or mistake in the office of the Secretary of State.

It is a well-settled principle of law that a tax voluntarily paid, with a full knowledge of the facts, cannot be recovered back, in the absence of a statute authorizing such recovery. It is equally well established that where a tax is paid under a mistake of fact, such payment is considered as not having been voluntarily made, and may be recovered. *Yates vs. Royal Insurance Co.*, 200 Ill. 202; *Board of Education vs. Toennigs*, 287 Ill. 469; *School of Domestic Arts vs. Harding*, 331 Ill. 330; *Richardson Lubricating Co. vs. Kinney*, 337 Ill. 122; *Hettler Lumber Co. vs. Cook County*, 336 Ill. 645; *Cooper Kanaley & Co. vs. Gill*, 363 Ill. 418; *American Can Co. vs. Gill*, 364 Ill. 254.

The difficulty arises in determining whether under the facts in the particular case, payment was made voluntarily, or whether it was made under a mistake of fact.

This claim arose prior to the adoption of "The Business Corporation Act" of this State, and therefore the rights of the claimant herein must be governed by the provisions of The General Corporation Act of this State, approved June 12th, 1919, in force July 1st, 1919 as amended.

Section 111 of such Act provides that the Secretary of State shall have power to hear and determine objections to any assessment within the time specified in the Act, and after hearing, to change or modify such assessment.

Section 112 of such Act provides that between the first day of February, and the 15th day of June of each year, the Secretary of State shall mail a notice in writing to each corporation against which a tax is assessed, notifying such corporation of the amount of the tax assessed against it, and that objections, if any, to such assessment will be heard by the officer making such assessment, upon request by the corporation on a date not later than the 25th day of June, etc.

The record fails to show that any objection was made by claimant to the tax assessed against it, or that a hearing was requested by the claimant, in accordance with the provisions of Section 112.

In an annotation appearing in 64 A. L. R., on page 55, the annotator after considering a large number of cases from different jurisdictions, reaches the following conclusion:

"According to this line of cases, representing, probably, the weight of authority, where the taxpayer has some other legal remedy or protection against the coercive acts of the collecting officer, he is bound to avail himself thereof, and if he neglects to do so, and pays the tax, such payment is deemed voluntary."

In Cooley on Taxation, 2d edition, page 810, the author says:

"All payments are supposed to be voluntary until the contrary is made to appear. Nor is the mere fact that a tax is paid unwillingly or with complaint, of any legal importance, but there must be in the case some degree of compulsion, to which the taxpayer submits at the time but with notification of some sort equivalent to reservation of rights."

The foregoing statement is quoted with approval by our Supreme Court in the case of *Yates vs. Royal Insurance Co.*, 200 Ill. 202, in which case the plaintiff sought to recover certain taxes which it had paid pursuant to the provisions of a law which was thereafter held to be unconstitutional. The court in that case held that the payment was voluntarily made, and that the plaintiff was not entitled to recover.

In the case of *Walzer vs. Board of Education*, 160 Ill. 272, the County Clerk erroneously entered certain real estate upon the tax collector's book as being in School District No. 1, whereas, in fact, it was located in District No. 2. The property owners paid the tax without knowledge of the mistake.

The amount paid was in excess of what they would have been required to pay if assessed in the proper district. In denying a right of recovery, the court, on page 275, said:

"The tax levied by District No. 1, as extended on lands belonging to District No. 2, was an illegal and void tax. That tax was paid by the owners of the property so illegally assessed, voluntarily. The books were open to inspection by the taxpayers, and the means of knowledge existed to learn and know all the facts. Money paid voluntarily by one with knowledge or means of knowledge of all the facts cannot be recovered back."

In the recent case of *Cooper Kanaley Co. vs. Gill*, 363 Ill. 418, a clerk in the assessor's office by mistake marked on the record card of plaintiff's property the fact that it was improved by a three-story hotel, and the property was assessed accordingly. As a matter of fact, the three-story hotel was on an adjoining lot. As a result of this mistake, plaintiff's taxes were over \$2,000.00 in excess of what they would have been, had no mistake been made. In deciding that the payments were made voluntarily, and therefore could not be recovered, the court said:

"Where taxes have been voluntarily paid in full on an over-assessment, due to arriving at a value based on mistake either of fact or judgment or other error on the part of the assessor, and where fraud was not an element in the over-assessment, courts are without jurisdiction to afford relief."

The statute provided a remedy for the claimant, but it failed to take advantage thereof. It paid the tax voluntarily, with a full knowledge of all the facts, and consequently under the decisions above referred to, the payment must be considered as having been voluntarily made, and claimant therefore is not entitled to a refund.

Award denied. Case dismissed.

(No. 3035—Claim denied.)

WILLIAM H. YOTT, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 15, 1937.

HERMAN JACOBS, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

ILLINOIS LIQUOR CONTROL LAW—license issued under—claim for refund of unearned portion of fee where licensee disposes of business—when award for denied. The Illinois Liquor Control Act does not provide for a refund of

license fees where licensee disposes of his business, and ceases to operate same, after application for such license is made, and after commencement of such license period, even though the actual issuance of such certificate has not yet taken place, and claim for such refund must be denied.

SAME—same—same—must be on grounds provided in law. The Illinois Liquor Control Law authorizes a refund of the unearned portion of license fees, issued thereunder, only when application for license is denied; in case of the death, insolvency or bankruptcy of the licensee and where the political subdivision, etc., in which licensed premises are situated becomes prohibition territory during the term of the license.

MR. JUSTICE YANTIS delivered the opinion of the court:

During the fiscal year 1935-36 claimant was engaged in the retail liquor business under license which expired April 30, 1936. Claimant in due course applied for a license as such retailer for the period from May 1, 1936 to June 30, 1937 and remitted therefor the proper fee in the sum of fifty-eight and 33/100 (\$58.33) Dollars, a receipt for which was given to him on May 2, 1936 by the Illinois Liquor Commission. On June 8, 1936 the Certificate or License was issued, to expire on June 30, 1937.

On or before June 6, 1936, plaintiff sold his interest in the tavern to one Patrick Murray, who immediately took over the operation of tavern. According to the record, plaintiff has not operated the tavern since the day of the sale. He requested a refund from the Illinois Liquor Control Commission and has filed his present claim in the amount of \$58.33 for the unused portion or period of such license permit.

The Attorney General on behalf of respondent has filed a motion to dismiss said claim, for the reason that there is no provision in law authorizing a refund of liquor license fees after the period has commenced to run for which such license was issued.

The Illinois Liquor Control Law does not provide for a refund of license fee where licensee disposes of his business and ceases to operate same, after application for such license is made, and after commencement of such license period, even though the actual issuance of such certificate has not yet taken place.

Paragraph 26 of the Liquor Control Act of Illinois (State Bar Statutes, Chap. 43) authorizes a refund of the unearned portion of license fees in only three cases, to-wit:

1. Where application is denied.
2. In case of the death, insolvency or bankruptcy of the licensee.

3. Where the political subdivision, etc., in which licensed premises are situated becomes prohibition territory during the term of the license.

The present claim does not come within either of the situations stated and there is no authority for allowance of said claim. Similar questions have been before the court in the following cases: *Robb vs. State*, No. 2706, decided at the January Term, 1936; *Black vs. State*, No. 2971, and *Beals, etc. vs. State*, No. 3020, both decided at the May Term, 1937, in all of which awards have been denied. By action of the legislature of 1937 (see Session Laws 1937, page 95), claimant is given right of redress upon direct application to State Department of Finance.

The motion of respondent is allowed and the claim dismissed.

(No. 3014—Claimant awarded \$5,500.00.)

KATHRYNE RYAN, WIDOW OF R. J. RYAN, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 15, 1937.

Claimant, pro se.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award for compensation for death may be made under.* Where it appears that employee of State sustains accidental injuries, arising out of and in the course of his employment, resulting in his death, while engaged in extra hazardous employment, an award for compensation may be made, in accordance with the provisions of the Act, to those legally entitled thereunder, upon compliance with the terms thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

Under a stipulation of facts filed in the above entitled cause it is disclosed that Kathryne Ryan, claimant herein, is the widow of Richard J. Ryan, deceased; that on the 13th day of June, 1936, and continuously for more than a year prior thereto, Richard J. Ryan was an employee in the Department of Public Works and Buildings, Highway Division of the State of Illinois, as a Maintenance Patrolman.

That on June 13, 1936 while he was engaged in sweeping loose stones at the intersection of U. S. Routes No. 12 and No. 14, two cars collided; one of them skidded across the pave-

ment, overturned and knocked Ryan into a sign post, causing injuries from which he died two days later. Deceased left surviving, Kathryne Ryan, his widow, and the following children; Patricia, age nine years, Joan, age five years and Alice, age eight months. Deceased was employed by respondent February 10, 1933 as Maintenance Patrolman, at a salary of One Hundred (\$100.00) Dollars per month. He continued in such position until the time of his death, his salary having been increased, September 1, 1935, to One Hundred Twenty (\$120.00) Dollars per month. All medical, hospital, nursing and ambulance bills have been paid by the State, in the sum of Two Hundred Fifty-seven and 25/100 (\$257.25) Dollars. Claimant seeks an award of Five Thousand Five Hundred (\$5,500.00) Dollars, under the terms of the Workmen's Compensation Act of Illinois.

It is apparent from the record that the actual injuries which caused the death of Richard J. Ryan arose out of and in the course of his employment; that respondent and the employee at the time of the accident were both under the provisions of said Act; that compliance with the various provisions of said Act have been observed in making claim herein; that inasmuch as the deceased employee left surviving, a widow and three children under the age of sixteen years, the amount due, if any, would be a sum equal to four times the average annual earnings of said employee, with the maximum allowance increased from Four Thousand (\$4,000.00) Dollars to Five Thousand Five Hundred (\$5,500.00) Dollars by virtue of Sections 7(a) 7(h-3) of the Workmen's Compensation Act of Illinois.

Plaintiff's actual wages for the year prior to his death were apparently One Thousand Three Hundred Ninety (\$1,390.00) Dollars. Four times such amount exceeds the maximum allowance and a total award of Five Thousand Five Hundred (\$5,500.00) Dollars would therefore be authorized. The usual basis for payments of fifty (50) per cent of the average weekly wage is increased to sixty-five (65) per cent because of the survival of three children. His average weekly wages would figure Twenty-seven and 69/100 (\$27.69) Dollars, and payments therefore on award at Eighteen (\$18.00) Dollars per week are authorized by virtue of Section 8(j3) of the Act. The amount of One Thousand One Hundred and Seventy (\$1,170.00) Dollars has accrued as an earned award

from June 15, 1936 to September 15, 1937, and the remainder is due in future payments.

The court finds Richard J. Ryan left surviving him at time of his death his widow, Kathryne Ryan, and his three daughters, Patricia Ryan, Joan Ryan, and Alice Ryan, the last three being each under the age of sixteen years and all dependent upon said Richard J. Ryan. The court finds that there is due on account of Kathryne Ryan, the surviving widow of Richard J. Ryan, deceased, under the terms of Section 7(a) of the Workmen's Compensation Act, the sum of Four Thousand (\$4,000.00) Dollars; that there is also due the further sum of Fifteen Hundred (\$1,500.00) by reason of the dependency of Patricia Ryan, Joan Ryan, and Alice Ryan, the three children of Richard J. Ryan, deceased, who were under the age of sixteen years at the time of their father's death.

The court in its discretion, as authorized under Section 7(g) of the Workmen's Compensation Act, further finds that the total amount of such payments including both the sum of Four Thousand (\$4,000.00) Dollars due the surviving widow and the additional amount of Fifteen Hundred (\$1,500.00) Dollars awarded on account of such minor children should be paid direct to the said Kathryne Ryan for the use of herself and said children until the further order of this court.

It is THEREFORE ORDERED that an award be and the same is hereby allowed in favor of Kathryne Ryan, Patricia Ryan, Joan Ryan, and Alice Ryan, in the sum of Five Thousand Five Hundred (\$5,500.00) Dollars, payable to the order of Kathryne Ryan as follows:

For amounts accrued for a period of sixty-five (65) weeks to September 14, 1937, \$1,170.00.

The balance due of \$4,330.00 to be paid in monthly installments on the basis of \$18.00 per week, commencing September 15, 1937 and continuing thereafter, subject to the terms of the Workmen's Compensation Act of Illinois.

It is THE FURTHER ORDER OF THE COURT that the total of said payments covering computation for both the surviving widow, Kathryne Ryan and the said three children shall be paid to said Kathryne Ryan until the further order of this court.

This award being subject to the provisions of an Act entitled, "An Act Making an Appropriation to Pay Compensa-

tion Claims of State Employees and Providing for the Method of Payment Thereof," approved July 3, 1937 (Sess. Laws 1937, p. 83) and being, by the terms of such Act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from said appropriation from the Road Fund in the manner provided for in such Act.

(No. 2608 Claim denied.)

NILES CENTER MERCANTILE CO., AN ILLINOIS CORPORATION, Claimant,
vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 10, 1937.

Rehearing granted June 30, 1937.

Opinion on rehearing filed September 15, 1937.

Claimant, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

FRANCHISE TAX—amount paid in excess of that due—owing to error of Secretary of State in computing—paid without protest and with knowledge of facts—is voluntary payment—remedy available to payer to obtain refund—failure to avail self of—bars award for. The same question involved herein was before the court in the case of Handy Button Machine Company vs. State, No. 2786, supra, and the opinion of this court in that case is decisive herein.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

An opinion was filed in above matter on February 10th, 1937; rehearing was allowed, and upon rehearing, the following opinion is substituted for the original opinion herein:

Claimant filed its complaint herein on February 18th, 1935 and therein asks an award in the amount of \$63.00 on account of an annual over-payment of franchise tax in the amount of \$9.00 for the years 1926 to 1933, both inclusive, except the year 1928.

Section 10 of the Court of Claims Law provides that every claim against the State cognizable by the Court of Claims shall be forever barred unless the claim is filed with the secretary of the court within five years after the claim first accrues. The complaint herein was filed February 18th, 1935, and we are therefore limited to a consideration of the overpayments claimed to have been made by claimant subsequent to February 18th, 1930.

From the evidence in the record it appears that for the years 1930, 1931, 1932 and 1933 claimant duly filed its annual report with the Secretary of State on the forms prepared by such Secretary; that each of such reports lists the amount of the authorized capital stock of the corporation at \$50,000.00; the total amount of capital stock issued at \$32,000.00; and the value of the consideration actually received by the corporation for such stock at \$32,000.00; that in each of such years (1930, 1931, 1932 and 1933) claimant was assessed and paid an annual franchise tax in the amount of \$25.00.

It is admitted that on the basis of such annual reports, claimant should have been assessed on the total amount of capital stock issued, and required to pay an annual franchise tax in the amount of \$16.00, to wit, \$9.00 less than it actually paid, and that the error was the result of inadvertence or mistake in the office of the Secretary of State.

It is a well-settled principle of law that a tax voluntarily paid, with a full knowledge of the facts, cannot be recovered back, in the absence of a statute authorizing such recovery. It is equally well established that where a tax is paid under a mistake of fact, such payment is considered as not having been voluntarily made, and may be recovered. *Yates vs. Royal Insurance Co.*, 200 Ill. 202; *Board of Education vs. Toennigs*, 287 Ill. 469; *School of Domestic Arts vs. Harding*, 331 Ill. 330; *Richardson Lubricating Co. vs. Kinney*, 337 Ill. 122; *Hettler Lumber Co. vs. Cook County*, 336 Ill. 645; *Cooper Kanaley & Co. vs. Gill*, 363 Ill. 418; *American Can Co. vs. Gill*, 364 Ill. 254.

The difficulty arises in determining whether under the facts in the particular case, payment was made voluntarily, or whether it was made under a mistake of fact.

This claim arose prior to the adoption of "The Business Corporation Act" of this State, and therefore the rights of the claimant herein must be governed by the provisions of The General Corporation Act of this State, approved June 12th, 1919, in force July 1st, 1919 as amended.

Section 111 of such Act provides that the Secretary of State shall have power to hear and determine objections to any ~~assessment~~ within the time specified in the Act, and after hearing, to change or modify such assessment.

Section 112 of the same Act provides that between the first day of February, and the 15th day of June of each year,

the Secretary of State shall mail a notice in writing to each corporation against which a tax is assessed, notifying such corporation of the amount of the tax assessed against it, and that objections, if any, to such assessment will be heard by the officer making such assessment, upon request by the corporation on a date not later than the 25th day of June, etc.

The record fails to show that any objection was made by claimant to the tax assessed against it, or that a hearing was requested by the claimant, in accordance with the provisions of Section 112.

The identical question here involved was presented to this court in the case of *Handy Button Machine Co. vs. State*, No. 2786, decided upon rehearing, at the present term of this court. In that case, after a consideration of the authorities on the question, we held as follows:

"The statute provided a remedy for the claimant but it failed to take advantage thereof. It paid the tax voluntarily, with a full knowledge of all the facts, and consequently under the decisions above referred to, the payment must be considered as having been voluntarily made, and claimant therefore is not entitled to a refund."

What we said in that case applies with equal force to the case at bar, and award must therefore be denied.

Award denied. Case dismissed.

(No. 2579 Claim denied.)

ALBERT W. YOUNG, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 15, 1937.

A. W. SCHIMMEL, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*making claim for compensation within time fixed in, condition precedent to jurisdiction of court.* Making claim for compensation within the time fixed in Act in jurisdictional and a condition precedent to the right to maintain a proceeding thereunder.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant has prepared a declaration at common law, and alleges damages in the sum of \$10,000.00. If there is any liability at all, it is under the Workmen's Compensation Act of this State.

The facts are that claimant was seriously injured on November 5, 1932, while in the employ of the State of Illinois as a maintenance man on Illinois State Route 36. Claimant was engaged in scattering sand over tar which had been poured in the cracks and crevices by another employee of the respondent, on a concrete highway, when he was struck by an automobile driven by one Merritt Bush Kaylor, with such force and violence that it is claimed he was injured externally and internally. He sustained a compound fracture of a limb and broken ribs, and injuries to his hip and spinal region; also a rupture and other bruises, and contusions both externally and internally.

We have elected to treat the complaint in this case as a petition under the Workmen's Compensation law. The claimant avers that he filed a suit at common law against Merritt Bush Kaylor in the Circuit Court of Pike County, Illinois, on March 15, 1934, to recover damages for wrongful injuries. The case was tried before a jury at the April Term thereof, 1934, and the jury found the defendant not guilty. It is averred that the claimant has received no money from the State of Illinois, or from Merritt Bush Kaylor since the date of the injury.

This action was not commenced in this court until January 17, 1935. Paragraph 6 of Section 6 of the Court of Claims Act provides as follows:

"Section 6. The Court of Claims shall have power:

"(6) To hear and determine the liability of the State for accidental injuries or death suffered in the course of employment by any employee of the State, such determination to be made in accordance with the rules prescribed in the Act commonly called the 'Workmen's Compensation Act,' the Industrial Commission being hereby relieved of any duty relative thereto."

We must, therefore, consider Section 24 of the Compensation Act, and this section provides that no proceedings for compensation under this Act shall be maintained unless claim for compensation has been made within six months after the accident, "provided, that in any case, unless application for compensation is filed with the industrial commission within one year after the date of the injury or within one year after the date of the last payment of compensation, the right to file such application shall be barred."

It is conceded that claimant received no compensation.

In the case of *Circular Advertising Service, Inc. vs. Industrial Commission*, 332 Ill. 156, our Supreme Court held:

"Where the record is barren of any showing that any claim for compensation was made by the injured employee or that any compensation was paid or medical services furnished an award of compensation cannot be sustained, as section 24 of the Compensation Act requires such claim to be made within six months after the accident or after payments have ceased, before the proceeding for compensation can be maintained."

To the same effect is the case of *The Chicago Board of Underwriters vs. The Industrial Commission*, 332 Ill. 611.

In the case of *The City of Rochelle vs. Industrial Commission*, 332 Ill. 386, the court held:

"The making of a claim for compensation as provided in Section 24 of the compensation Act is jurisdictional and a condition precedent to the right to maintain proceedings under the Act, and whether a claim for compensation has been made is a question of fact, to be determined as any other similar question."

Again, in *Lewis vs. Industrial Commission*, 357 Ill. 309, it was held that:

"The making of a claim for compensation within the statutory period is jurisdictional and a condition precedent to the right to maintain a proceeding under the Compensation Act."

Under the authorities herein cited, this court has no jurisdiction in this cause, and an award is accordingly denied.

(No. 2576—Claim denied.)

STERLING BREWERS, INC., A CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 15, 1937.

DOYLE, SAMPSON & GIFFIN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

Tax—voluntarily paid—cannot be recovered. Where tax is paid voluntarily and with a full knowledge or means of obtaining same, of all of the facts, and solely as a result of error on part of payer, no award for refund of same can be made, even though same be illegal or excessive.

SAME—paid by two different persons—claim for refund by one legally liable for will be denied. Where tax is paid by one legally liable therefor and also by one not so liable, claim for refund by former will be denied, as his payment was for his legal obligation and the payment of same by one not obligated, deprives him of no right and affords no basis for an award.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant is an Indiana corporation duly authorized to transact business in this State, and duly licensed as an importing distributor under the Illinois Liquor Control Act.

It has been stipulated by the parties hereto that the material allegations of fact contained in the complaint herein are true and correct, and the case comes on for hearing upon the facts set forth in the complaint, and admitted to be true and correct as aforesaid.

From the complaint herein it appears that during the period from February 1st, 1934 to March 13th, 1934, claimant imported into this State twenty whole barrels; 1,719 half-barrels; 1,023 fourth-barrels; 19,953 cases; and twelve half-cases of beer; that claimant computed the total of such imports to be 82,739 gallons, and paid to the Department of Finance a tax of two cents per gallon thereon, to-wit, \$1,654.78; that as a matter of fact, the total of such imports was 80,000½ gallons, on which the tax legally required to be paid was \$1,602.01.

It further appears from the complaint herein that during the period aforementioned, claimant sold to certain named retailers in this State the aggregate amount of 10,646¾ gallons of beer, on which it paid the Department of Finance a tax of two cents per gallon, to-wit, the sum of \$212.93; that each such sale was made under the mistaken assumption that the claimant was required to pay the tax in the first instance, and add the same to its charge for such beer; that thereafter the Liquor Control Commission and the Department of Finance, or one of them, determined that the tax in question should be imposed upon and paid by the retailers; that thereupon the Liquor Control Commission, or the Department of Finance, again collected the amount of the tax required to be paid on such beer from such retailers, whereby such tax was twice paid to the respondent.

It further appears from said complaint that the aforementioned period was a period of uncertainty and confusion in the administration of the Illinois Liquor Control Law, and the aforementioned payments were made by claimant without the benefit of administrative rulings and orders such as were subsequently promulgated by said Liquor Control Commission, and said Department of Finance, and were made by the claimant in fear of the penalties provided in the Illinois Liquor Control Law for the failure to comply with the requirements thereof.

Claimant asks for a refund of the amount overpaid by it as aforesaid, to-wit, \$52.77, as well as the amount which it

claims was erroneously paid by it as aforesaid, to-wit, \$212.93, making a total amount of \$265.70.

The rule is well established in this State that where an illegal or excessive tax is paid voluntarily, with full knowledge of all the facts, the same cannot be recovered. It is equally well established that where such tax is paid under a mistake of fact, it is not considered as having been paid voluntarily; also that where such tax is paid under a mistake of law, it may not be recovered. *Yates vs. Royal Insurance Co.*, 200 Ill. 202; *Board of Education vs. Toennigs*, 287 Ill. 469; *School of Domestic Arts vs. Harding*, 331 Ill. 330; *Richardson Lubricating Co. vs. Kinney*, 337 Ill. 122; *Hettler Lumber Co. vs. Cook County*, 336 Ill. 645; *Cooper Kanaley & Co. vs. Gill*, 363 Ill. 418; *American Can Co. vs. Gill*, 364 Ill. 254.

In the case of *Western Dairy Co. vs. State*, No. 2916, decided at the May 1937 term of this court, the question involved was whether a corporation which had paid an excessive franchise tax as the result of its own mistake or error was entitled to recover the amount of the excess so paid. After a consideration of the authorities upon the subject, we there held that where an illegal or excessive tax is imposed by reason of the negligence or inadvertence of the taxpayer and thereafter paid by him, such payment is not made under a mistake of fact and cannot be recovered.

The item of \$52.77 was paid as the result of an error on the part of the claimant in computing the gallonage upon which the tax should be paid. The facts with reference to such gallonage were peculiarly within the knowledge of the claimant. There was no error on the part of the respondent. The tax was paid voluntarily and with a full knowledge, or means of knowledge, of all the facts, and solely as the result of an error on the part of the claimant. Under such circumstances, and under the authorities above set forth, the claimant is not entitled to a refund of the excess tax so paid by it as aforesaid.

The payment of the item of \$212.93 as above set forth, presents a different question. The tax there involved arose under the provisions of "The Malt and Vinous Beverage Act," of 1933. Sections 12, 13 and 15 of such Act provided as follows:

Section 12—"A tax is imposed upon the privilege of engaging in business as a manufacturer or as an importing distributor at the rate of two

cents per gallon on all malt and vinous beverages sold by such manufacturer or importing distributor in the course of such business." * * *

Section 13—"Every manufacturer and importing distributor shall between the first and fifteenth day of the next calendar month after the taking effect of this Act and of each calendar month thereafter, make return under oath to the Department of Finance of all malt and vinous beverages sold by him in the course of such business during the preceding calendar month and shall at the same time pay to the department the tax herein imposed."

Section 15—"The Department of Finance may make such reasonable rules and regulations as may be deemed necessary for the administration of the duties vested in it by the provisions of this Act."

Under the aforementioned provisions, the tax in question was required to be paid by the claimant and not by the retailer. The Department of Finance was authorized to make reasonable rules and regulations for the administration of the duties vested in it, but had no authority to make any rules or regulations which were inconsistent with the provisions of the statute; consequently, any rules or regulations adopted by the Department, where the tax in question was required to be paid by the retailer instead of the distributor, were unauthorized and void. The mere fact that the tax was twice paid to the State, does not give the claimant a right of recovery, as the tax was required to be paid by it. If anyone was entitled to a refund on account of the double payment, it was the retailer who was not legally required to pay the tax.

Under the law then in force, the claimant was required to pay the tax, and consequently is not entitled to a refund.

Award denied. Case dismissed.

(No. 2246—Claim denied.)

GEORGE FRANKLIN GARBUTT, ADMINISTRATOR OF THE ESTATE OF
WESLEY GARBUTT, DECEASED, Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed January 9, 1935.

Rehearing granted February 12, 1935.

Opinion on rehearing filed September 15, 1937.

WINSTON, STRAWN & SHAW, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN,
Assistant Attorney General, for respondent.

HIGHWAYS—maintenance of, governmental function. The State exercises a governmental function in the construction and maintenance of public highways and is not liable for damages caused by either a defect in the construction or failure to maintain same in a safe condition.

SAME—negligence of employee of State, in construction or maintenance of—State not liable for. The State is not liable for the negligence of its officers, servants or agents, in the conduct of a governmental function, unless there is a statute making it liable, and in this State there is no such statute.

SAME—same—personal injury sustained as the result of—award for on grounds of equity and good conscience cannot be made. Regardless of the merits of a claim for damages for personal injuries, or for damage to property, sustained as the result of the negligence of an officer, agent or servant of the State, or the extent or seriousness of such injuries, or the degree of negligence of such officer, agent or servant, or the absence of contributory negligence, an award cannot be made for such damages on the grounds of equity and good conscience.

MR. CHIEF JUSTICE HOLLENBACH delivered the opinion of the court:

On August 10th, 1933 Mr. A. S. Dougherty, maintenance patrolman on Section 133, S. B. I. Route 172, together with his helper, was cutting and burning weeds along the right-of-way of said highway about two miles north of Libertyville in Lake County. The highway at that point extended in a northerly and southerly direction and consisted of a 20-foot concrete roadway with dirt shoulders. In some manner the fire was communicated to a tree situated sixteen feet west of the west side of the concrete roadway. This tree was a spreading oak tree about forty feet in height and thirty-seven inches in diameter at the base and leaned toward the roadway. It was a bee tree which was decayed at the bottom, and was hollow for some distance up the trunk. The hole in which the bees entered was about ten feet above the base of the tree.

Mr. Dougherty and his helper tried to put out the fire with a jug of water, but without result. They remained in the vicinity until about four-thirty or five o'clock p. m., but there were so many bees there that it was difficult to do anything further at that time. Both men saw the tree again the next day and it was still burning. The next day (Saturday, August 12th) the tree was still burning, and the helper poured two eight-gallon cans of water into it, but it still continued to smoulder. On August 17th, 1933 about five o'clock p. m. a windstorm came up and blew fiercely for a short time

and broke the tree off about nine feet from the ground, just at the point where the bees had entered.

Just as the tree was about to fall, claimant's intestate, Wesley Garbutt, was driving along S. B. I. Route 172 in a southerly direction in his Ford car with the top down, and just as he was opposite the tree, it toppled directly across the pavement and onto the car in which he was riding. The tree rebounded, and the rebound released the car which thereafter continued down the road 100 or 200 feet and ran into a ditch, throwing Mr. Garbutt out as it climbed the embankment.

Some people who were approaching from the opposite direction stopped and picked Garbutt up and took him to the hospital in Libertyville. He was unconscious and bleeding profusely and died the next day as the result of the injuries received when he was struck by the tree.

Said decedent left him surviving his father, his mother, a brother and a sister, as his only heirs.

The father, George Franklin Garbutt, was appointed administrator of the estate and filed his claim herein on September 14th, 1933 to recover the damages claimed to have been sustained by the next of kin by reason of the death of said decedent.

The Attorney General has moved to dismiss the case for the reason that the doctrine of respondent superior does not apply to the State in the exercise of its governmental functions and that therefore the State is not liable for the negligence of its servants and agents, if any—in this case.

The claimant admits that there is no liability on the part of the State for the negligence of its servants and agents in the exercise of its governmental functions, but claims that an award should be made to the claimant on the grounds of equity and good conscience.

The same contention was made by the claimant in the case of *George Ira Curry vs. State*, No. 2412, decided at the present term of this court. In that case we said:—

“We are aware of the fact that during a certain period in the history of this court, awards were made in cases where the State was not legally liable, and which were sought to be justified on the grounds of what was known as the doctrine of equity and good conscience. However, the court as now constituted, has not seen fit to follow the decisions just re-

ferred to, but has followed the earlier decisions of the court to the effect that the provisions of Section 6 of the Court of Claims Act, and particularly paragraph four (4) thereof, which provides that this court shall have power to hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, ex contractu and ex delicto, which the State as a sovereign commonwealth should, in equity and good conscience, discharge and pay;—does not increase or enlarge the liability of the State, but merely provides a forum wherein claims against the State may be adjudicated.

“This question was exhaustively considered in the case of *Crabtree vs. State*, 7 C. C. R. 207, in which the authorities on the question from the time of the creation of the court down to the date of the hearing, were analyzed and considered. After a consideration of the authorities on the question, we reached the following conclusion:

“We conclude, therefore, that Section four (4) of Paragraph six (6) of the Court of Claims Act, which provides as follows, to-wit: ‘The Court of Claims shall have power: ‘to hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, ex contractu and ex delicto, which the State as a sovereign commonwealth, should, in equity and good conscience, discharge and pay’; merely defined the jurisdiction of the court, and does not create a new liability against the State, nor increase or enlarge any existing liability; that the jurisdiction of this court is limited to claims in respect of which the claimant would be entitled to redress against the State either at law or in equity, if the State were suable; that this court has no authority to allow any claim unless there is a legal or equitable obligation on the part of the State to pay the same, however much the claim might appeal to the sympathies of the court; that unless the claimant can bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure such an award.

“The claimant having failed to bring himself within the provisions of the law entitling him to an award, there is nothing this court can do but deny the claim.”

What we said in the *Curry* case applies with equal force to this case. The legislature has not enacted any law making the State liable for the negligence of its servants and agents in connection with the maintenance of its hard-surfaced roads, and there being no legal liability on the part of the State, this court has no jurisdiction to enter an award.

The death of claimant’s intestate under the circumstances set forth in the complaint is very regrettable, and the claim filed herein appeals very strongly to the sympathies of the court, but as stated in the case of *Morrissey vs. State*, 2 C. C.

R. 254, we do not make the law and can only interpret it as we find it, and much as we would like to enter an award for the claimant in this case, we must reject the claim.

It is therefore ordered that an award be denied and the case dismissed.

ADDITIONAL OPINION ON REHEARING.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Rehearing having been allowed on the petition of the claimant, he urges that the facts in the record show that the servants and agents of the respondent were guilty of gross and wanton negligence; that the plaintiff's intestate was free from contributory negligence; and that under such circumstances, an exception exists to the general rule that the State is not liable for the acts of its servants and agents under the doctrine of respondeat superior.

Even if it be conceded that the facts in the record do show that the servants and agents of the respondent were guilty of gross and wanton negligence, and that the claimant's intestate was free from contributory negligence, still under the repeated decisions of the court, the claimant is not entitled to an award.

As stated in the original opinion, during a certain period in the history of this court, awards were made in certain cases in which there was no legal liability on the part of the State. In the earlier cases so decided, the facts appealed very strongly to the sympathies of the court, and the awards there made were attempted to be justified on the grounds of "equity and good conscience."

Thereafter the court apparently recognized the dangerous tendency of such decisions, and the extent to which they were being carried, and gradually began to get back to the earlier decisions of the court, to the effect that this court has no authority to allow an award in any case unless there would be a legal liability on the part of the State if the State were suable.

In the course of such transition, awards were allowed in certain cases where the claimant was free from contributory negligence, and the servants and agents of the respondent were guilty of gross and wanton negligence, and such awards

were attempted to be justified on the ground that such cases constituted an exception to the general rule that the State is not liable for the acts of its servants and agents under the doctrine of respondent superior.

If the State is not liable for the ordinary negligence of its servants and agents, there is no principle of law under which it can be held liable for the gross or wanton negligence of such servants and agents, in the absence of a statute making it so liable. The purported exception has no basis in law, and is no longer recognized by this court.

The rule as laid down in the case of *Crabtree vs. State*, 7 C. C. R. 207, and as set forth in the original opinion herein has been followed in nineteen cases reported in the last published volume of the reports of this court (Volume 8), as well as in many more cases decided since the publication of such volume, and must now be considered as the well-established rule of this court.

For the reasons above set forth, award must be denied.
Award denied. Case dismissed.

(No. 2909—Claim denied.)

McCAMPBELL & COMPANY, Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed October 12, 1937.

Claimant, pro se.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

FEDERAL PROCESS TAX—amount of omitted from bill for goods sold State—when State not liable for. Where claimant sold goods to State and omitted to include in bill therefor, amount of processing tax, State is not liable for the payment thereof, especially where seller is afforded remedy for recovery of same, if paid by it, in the United States Court of Claims.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks an award of Twenty-one and 38/100 (\$21.38) Dollars, representing that respondent had purchased a quantity of denim for the use of the St. Charles School for Boys, on August 1, 1934. That claimant submitted an invoice which did not include the Processing Tax of Twenty-one and 38/100 (\$21.38) Dollars which was then being assessed on

sales, but which was not included in this instance because of the representation that the St. Charles School for Boys was a charitable institution, and that the Federal Government would refund to the processor the tax on the goods purchased. The Federal authorities ruled that the St. Charles School for Boys was not a charitable institution and denied the refund. Petitioner's claim was filed June 1, 1936 after the Federal Commissioner had notified them that their claim for credit on tax paid had been rejected.

The tax in question was assessed under the provisions of the Federal Agricultural Adjustment Act.

The Attorney General moves to dismiss the claim on the ground that claimant seeks an award predicated upon liability of the State for a tax for which the State is not liable.

The Agricultural Adjustment Act, under which the tax was levied was held unconstitutional in the case of *U. S. vs. Butler*, 287 U. S. 1.

"Where the processor has not passed the tax on to the consumer he may, under Sections 901 to 917 of Title VII of the Revenue Act of 1936, recover the tax from the Federal government, and if the Commissioner refuses a refund under the above sections, the processor may prosecute his claim in the United States Court of Claims."

Annisston Mfg. Co. vs. Davis. (Opinion rendered by U. S. Supreme Court May 17, 1937.)

In the instant case the tax was not passed on to the consumer and claimant apparently has an adequate remedy in presenting its claim to the Federal Government.

The motion of the Attorney General is therefore allowed and the claim is dismissed.

(No. 2763—Claim denied.)

TWIN CITY BARGE AND GRAVEL COMPANY, A CORPORATION, Claimant,
vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 12, 1937.

LEIGH M. KAGY, EARL H. ISENSEE and GEORGE A. FRENCH,
for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

MOTOR FUEL TAX—claim for refund—when denied. Where moneys are paid for tax on motor fuel, which might have been recovered if payer had

availed itself of remedy provided by law for such recovery, recourse to said remedy must be had, and if payer fails to do so within the time prescribed therein, no relief can be had in the Court of Claims.

SAME—same—Court of Claims—jurisdiction. Where statute provides a remedy and fixes time within which same must be availed of, Court of Claims has no jurisdiction to extend such time.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This action was commenced by the Twin City Barge and Gravel Company, a corporation, on December 6, 1935. On the 22nd day of September, 1936, James A. Campbell was appointed Receiver by the District Court of Hennepin County, Minnesota, the claimant being a Minnesota corporation.

It is charged that from June, 1932 until July, 1933, the claimant was engaged in hydraulic dredging and excavation work in the channel of the Illinois River in the State of Illinois, near the City of Joliet, in what was generally known as the "Dresden Pool," as a subcontractor, the principal contractor being Arundel Corporation, which held a contract with the United States Government for the improvement in question. In the performance of their work of hydraulic dredging and excavation, they bought 134,429 gallons of gasoline. Of this amount, 1,219 was used by their truck and by the cars of employees from February 1 to July 7, 1933, inclusive, leaving a total of 133,210 gallons of gasoline. They were charged 3c tax per gallon on said 133,210 gallons of gasoline, or \$3,996.30. Of this amount, refunds have been collected on this job for gas that was paid for, in the sum of \$3,056.96, leaving an unearned Motor Fuel Tax not refunded in the sum of \$939.36, and we are asked to make an award in the sum of \$939.36, this representing the amount of Motor Fuel Tax that they had been charged for the gasoline which was not used upon the road.

It is claimed that extra costs arose on the dredging and excavation work due to the nature of the work and to working conditions not contemplated by the general contract between the Government and the original contractor, The Arundel Corporation, and the original contractor refused to pay the claimant the sums due under the subcontract, and the claimant was compelled to resort to litigation to collect the money so due to it, and because of this delay and the pendency of the litigation, the claimant was unable to pay the distributor for the gasoline so used by it before the expiration of six months

after the date on which the motor fuel was used by the claimant, as aforesaid. It is further claimed that the claimant was definitely advised by the then officials of the State of Illinois in charge of the collection and refund of motor fuel tax that no claim for refund would or could be entertained prior to the payment by the claimant to the distributor. It is also charged that this claim was presented to the Division of Motor Fuel Tax of the Department of Finance, and on or about the 23rd day of October, 1934, this Department refused the application of the claimant for reimbursement for said motor fuel so used for the reason that the Department was without administrative authority to grant the request under the provisions of the statute.

The Attorney General has made a motion to dismiss this suit, and as we view the law, this motion must be sustained.

Paragraph 91 of Chapter 95a, Illinois Revised Statutes for 1935, makes it very plain and clear that any person who loses motor fuel through any cause or uses motor fuel (upon which he has paid the amount required to be collected under this Act) for any purpose other than operating a motor vehicle upon the public highways of this State, shall be reimbursed and repaid the amount so paid, but the claims for such reimbursement shall be made to the Department of Finance, duly verified by the affidavit of the claimant, or one of the principal officers, if the claimant is a corporation, upon forms prescribed by the Department, and the claim should state such facts relating to the purchase, importation, manufacture or production of the motor fuel by the claimant as the Department may deem necessary, and the time when, and the circumstances of its loss or the specific purpose for which it was used, and claims for reimbursement must be filed not later than six months after the date on which the motor fuel was lost or used by the claimant. The statute directs the manner in which the reimbursement should be made.

Claimant did not present a proper claim within a six months' period fixed by the statute, but attempts to excuse that delay on the grounds that it had not been paid by the principal contractor. The statute does not recognize any such exceptions. It is not contended that the money was paid under protest.

doctrine of respondent superior is not applicable to the State as a sovereign power, and it is not liable for damages, injuries or death, resulting from the negligence of its officers, agents or employees, under any theory of law or equity.

MR. JUSTICE YANTIS delivered the opinion of the court:

On the 10th day of September, A. D. 1935, according to the amended complaint filed herein, Evelyn Barica was riding as a guest in a Ford delivery truck, owned by Joseph Handzel and driven at the time by the latter's son Edward Handzel. That at or near the intersection of First Avenue and North Avenue, in Leyden Township, Cook County, Illinois, the auto in which said Evelyn Barica was riding was struck by an automobile bus owned by the St. Charles School for Boys, and then and there driven by one Clarence Johnson, an employee of said school; said St. Charles School for Boys, as alleged by claimant, having been created and established by an Act of the General Assembly of the State of Illinois, in force July 1, 1901; that as a direct result of such collision Evelyn Barica sustained bodily injuries from which she died on the 10th day of September, A. D. 1935. Deceased left surviving, her father Andrew Barica, who also is now deceased, her mother, Olga Barica, who as Administratrix of the Estate of Evelyn Barica, files this claim, and two sisters and a brother as her only next of kin. Claimant seeks an award of Ten Thousand (\$10,000.00) Dollars.

The Attorney General has filed a motion on behalf of respondent to dismiss the claim, for the reason that same is predicated solely on the alleged liability of respondent for an alleged negligent act of one of its employees, for which the State is not legally liable.

The court has been called upon repeatedly to pass upon claims of a similar nature. The opinion of the court has been frequently expressed as follows:

"The State as a sovereign power, is not liable for damages, injuries or death resulting from the negligence of its officers or employees. The doctrine of *Respondent Superior* does not apply to the State."

The views of the court are expressed at length in *Crabtree vs. State*, 7 C. C. R. 207 and *Childress vs. State*, 8 C. C. R. 223.

The motion of the Attorney General to dismiss the claim is allowed, and the claim is dismissed.

CORRECTION

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after the date on which the motor fuel was used by the claimant, as aforesaid. It is further claimed that the claimant was definitely advised by the then officials of the State of Illinois in charge of the collection and refund of motor fuel tax that no claim for refund would or could be entertained prior to the payment by the claimant to the distributor. It is also charged that this claim was presented to the Division of Motor Fuel Tax of the Department of Finance, and on or about the 23rd day of October, 1934, this Department refused the application of the claimant for reimbursement for said motor fuel so used for the reason that the Department was without administrative authority to grant the request under the provisions of the statute.

The Attorney General has made a motion to dismiss this suit, and as we view the law, this motion must be sustained.

Paragraph 91 of Chapter 95a, Illinois Revised Statutes for 1935, makes it very plain and clear that any person who loses motor fuel through any cause or uses motor fuel (upon which he has paid the amount required to be collected under this Act) for any purpose other than operating a motor vehicle upon the public highways of this State, shall be reimbursed and repaid the amount so paid, but the claims for such reimbursement shall be made to the Department of Finance, duly verified by the affidavit of the claimant, or one of the principal officers, if the claimant is a corporation, upon forms prescribed by the Department, and the claim should state such facts relating to the purchase, importation, manufacture or production of the motor fuel by the claimant as the Department may deem necessary, and the time when, and the circumstances of its loss or the specific purpose for which it was used, and claims for reimbursement must be filed not later than six months after the date on which the motor fuel was lost or used by the claimant. The statute directs the manner in which the reimbursement should be made.

Claimant did not present a proper claim within a six months' period fixed by the statute, but attempts to excuse that delay on the grounds that it had not been paid by the principal contractor. The statute does not recognize any such exceptions. It is not contended that the money was paid under protest.

We have held that:

"Where a statute provides a remedy and fixes the time within which the same may be availed of, the Court of Claims has no jurisdiction to extend such time." *Silver-Burdett & Co. vs. State*, 8 C. C. R. 539.

We hold that this case is in point.

The claimant, not having justified its delay in seeking the refund, the motion of the Attorney General must be sustained and cause dismissed.

(No. 2956—Claim denied.)

JANE B. SHUFFLETON, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 12, 1937.

Claimant, pro se.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

PENAL INSTITUTIONS—prisoners on parole from—State not liable for acts or expenses of, or incurred for. Where statute provides that where inmate of penal institution is released on parole, same is without expense to the State, a claim by one to whom an inmate was paroled, for expenses incurred in treating inmate for injuries suffered while working in home of claimant, will not lie under any theory of law or equity.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

In March, 1936 one Margaret Bayne, who was then a prisoner at the Illinois State Penitentiary at Joliet was paroled to the claimant Jane B. Shuffleton. On May 18th, 1936 said Margaret Bayne, while working in the home of the claimant, was severely burned while making a fire in a hot water heater, and it became necessary to take her to a hospital for treatment. She remained in the hospital about six weeks, and during that time claimant expended the sum of \$799.21 for necessary medical attention, hospitalization and nurses' fees, and asks for an award in that amount.

The Attorney General contends that there is no liability on the part of the State under the facts set forth in the complaint, and has moved to dismiss the claim.

We have repeatedly held that the jurisdiction of this court is limited to claims in respect of which the claimant would be entitled to redress against the State either at law or in equity, if the State were suable. *Crabtree vs. State*, 7

C. C. R. 207; *Kramer vs. State*, 8 C. C. R. 31; *Shumway vs. State*, 8 C. C. R. 43; *Titone vs. State*, decided at the January, 1937 term of this court.

Our attention has not been called to any statute which makes the State liable for medical, surgical, hospital or nursing services for the inmate of any State penal institution while on parole. On the contrary, Section Seven (7) of the Parole Act of this State—Illinois State Bar Association Statutes, 1935, Chapter 38, Paragraph 801—indicates a legislative intention that prisoners while on parole should not be an expense to the State. Said Section Seven (7) provides in part as follows:

"No prisoner or ward shall be released from either the penitentiary or reformatory for women or such other institution herein in this Act mentioned until the Department of Public Welfare shall have made arrangements or shall have satisfactory evidence that arrangements have been made for his or her honorable and useful employment while upon parole in some suitable occupation and also for a proper and suitable home free from criminal influences and without expense to the State."

Even if Margaret Bayne had been injured while still an inmate of the penitentiary, she would not have been entitled to recover damages from the State for such injuries, under the repeated decisions of this court. *Burghardt vs. State*, 5 C. C. R. 221; *Pelka vs. State*, 6 C. C. R. 390; *Sturrock vs. State*, 7 C. C. R. 157; *Parks vs. State*, 8 C. C. R. 535; *Shilkitis vs. State*, No. 2355, decided at the January term, 1937.

Under the facts set forth in the complaint, we have no authority to allow an award, and the motion of the Attorney General must be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 2969—Claim denied.)

OLGA BARICA, as Administratrix of the Estate of Evelyn Barica, Deceased, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 12, 1937.

BENJAMIN S. ADAMOWSKI, H. IRVING RIPSTRA and WILLIAM F. COPPER, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

NEGLIGENCE—agents or servants of State—causing personal injury, resulting in death—State not liable for under any theory of law or equity. The

doctrine of respondeat superior is not applicable to the State as a sovereign power, and it is not liable for damages, injuries or death, resulting from the negligence of its officers, agents or employees, under any theory of law or equity.

MR. JUSTICE YANTIS delivered the opinion of the court:

On the 10th day of September, A. D. 1935, according to the amended complaint filed herein, Evelyn Barica was riding as a guest in a Ford delivery truck, owned by Joseph Handzel and driven at the time by the latter's son Edward Handzel. That at or near the intersection of First Avenue and North Avenue, in Leyden Township, Cook County, Illinois, the auto in which said Evelyn Barica was riding was struck by an automobile bus owned by the St. Charles School for Boys, and then and there driven by one Clarence Johnson, an employee of said school; said St. Charles School for Boys, as alleged by claimant, having been created and established by an Act of the General Assembly of the State of Illinois, in force July 1, 1901; that as a direct result of such collision Evelyn Barica sustained bodily injuries from which she died on the 10th day of September, A. D. 1935. Decedent left surviving, her father Andrew Barica, who also is now deceased, her mother, Olga Barica, who as Administratrix of the Estate of Evelyn Barica, files this claim, and two sisters and a brother as her only next of kin. Claimant seeks an award of Ten Thousand (\$10,000.00) Dollars.

The Attorney General has filed a motion on behalf of respondent to dismiss the claim, for the reason that same is predicated solely on the alleged liability of respondent for an alleged negligent act of one of its employees, for which the State is not legally liable.

The court has been called upon repeatedly to pass upon claims of a similar nature. The opinion of the court has been frequently expressed as follows:

"The State as a sovereign power, is not liable for damages, injuries or death resulting from the negligence of its officers or employees. The doctrine of *Respondent Superior* does not apply to the State."

The views of the court are expressed at length in *Crabtree vs. State*, 7 C. C. R. 207 and *Childress vs. State*, 8 C. C. R. 223.

The motion of the Attorney General to dismiss the claim is allowed, and the claim is dismissed.

(No. 3119—Claim denied.)

L. H. GROTHE, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 12, 1937.

DON D. RICHMOND, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

DAMAGE TO PROPERTY—not taken for public use—by reason of construction of public improvement—loss of revenue, not proper element of. Inconvenience to, or loss of business suffered by owner of property, not taken for public use, in vicinity of public improvement, during the progress of the construction thereof, does not constitute damage to property, not taken for public use, within the meaning of the Constitution, but merely a burden incidentally imposed upon private property adjacent to public work, without which public improvements can seldom be made, and no claim will lie against the State for damages therefor.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant filed his complaint herein on July 6th, 1937, and alleges therein as follows:

For approximately six years prior to and on the 1st day of March, A. D. 1936, he was engaged in conducting a gasoline filling station, garage and general sales room in Tolono, Illinois, adjacent to U. S. Route No. 45. On March 1st, 1936 the Division of Highways of the Department of Public Works and Buildings of the respondent, blocked off and barred said highway from a point 300 feet north of claimant's place of business to a point 1,000 feet south thereof, and re-routed over other streets, the traffic which otherwise would have traveled directly in front of claimant's place of business. Such conditions continued until November 1st, 1936, when said U. S. Route No. 45 was again opened to traffic.

Claimant further alleges that by reason of the blocking of said highway and the re-routing of traffic over other streets as aforesaid, he lost considerable business, his profits were reduced, and he thereby sustained damages in the amount of \$448.86, for which amount he asks an award.

It is not contended that any of claimant's property was taken, or that any of his property was damaged, except as to the loss of anticipated profits as above set forth.

The Attorney General has moved to dismiss the claim on the ground that there is no liability on the part of the State under the facts set forth in the complaint.

If claimant has any right of recovery it must be by virtue of the constitutional provision to the effect that private property shall not be taken or damaged for public use without just compensation.

The question here involved has been considered by this court in a number of cases. In the case of *Grassle vs. State*, 8 C. C. R. 151 we held that:

"Inconvenience, expense, or loss of business necessarily occasioned to the owners of abutting property during the progress of the work by the construction of a public improvement, do not constitute damage to property not taken, within the meaning of the Constitution, but merely a burden incidentally imposed upon private property adjacent to a public work, and without which such improvements can seldom be made and therefore give no cause of action against a municipality therefor."

The rule laid down in the *Grassle* case finds support in the following cases, to wit: *Stein, et al vs. State*, 8 C. C. R. 251; *Glenbard Golf Club, Inc. vs. State*, 8 C. C. R. 651; *James Morlock vs. State*, No. 2072, decided at the September, 1935 term of this court.

This is in accordance with repeated decisions of our Supreme Court. *Osgood vs. City of Chicago*, 154 Ill. 194; *Lefkowitz vs. City of Chicago*, 238 Ill. 223; *Chicago Flour Co. vs. City of Chicago*, 243 Ill. 268; *Peck vs. Chicago Railways Co.*, 270 Ill. 34; *City of Winchester vs. Ring*, 312 Ill. 552.

We have repeatedly held that the jurisdiction of this court is limited to claims in respect of which the claimant would be entitled to redress against the State either at law or in equity, if the State were suable. *Crabtree vs. State*, 7 C. C. R. 207; *Kramer vs. State*, 8 C. C. R. 31; *Shumway vs. State*, 8 C. C. R. 43; *Titone vs. State*, decided at the January term, 1937, of this court.

Therefore we have no authority to allow an award in this case, and the motion of the Attorney General must be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 3101—Claim denied.)

FRANK A. ULIE and JOHN A. MORENO, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinton filed October 12, 1937.

HERMAN T. WEISS, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

ILLINOIS LIQUOR CONTROL LAW—license issued under—claim for refund of unearned portion of fee where licensee disposes of business—when award for must be denied. The facts in this case are almost identical with those in *Yott vs. State*, No. 3035, *supra*, and the opinion in that is controlling herein.

Mr. Justice YANTIS delivered the opinion of the court:

Claimants, operating as a co-partnership under the firm name of MIDWEST LIQUOR COMPANY, located at 11 South Kedzie Avenue, Chicago, Illinois, applied, on May 13, 1936, for a license as a Distributor of Alcoholic Liquors, and for another License as a Retailer of Alcoholic Liquors, both Licenses to be operative from May 1, 1936 to July 1, 1937. They paid One Hundred Sixteen and 67/100 (\$116.67) Dollars for the Distributor's License, and Fifty-eight and 33/100 (\$58.33) Dollars for the Retailer's License. On June 30, 1936 claimants sold their liquor business and new licenses were applied for and issued to their successors. Claimants now seek a refund of the license fees covering the period from July 1, 1936 to July 1, 1937, in the sum of One Hundred Fifty (\$150.00) Dollars. The fees thus paid by claimants were under the optional provisions of the Illinois Liquor Control Act which permitted claimants to take out such license for the short term of the unexpired year or for the longer period extending to the end of the next fiscal year, which latter they elected to do. Section 146, Chapter 43 of the Illinois State Bar Statutes, 1935 provide certain limited cases in which a refund of the unearned portion of a license fee is authorized. This application does not fall within either of such provisions. This question has recently been before the court in the following cases:

Block vs. State of Ill., No. 2971. Opinion filed by Court of Claims, May term, 1937.

Kellner vs. State of Ill., No. 2546. Opinion filed by Court of Claims, May term, 1937.

S. A. Beals vs. State of Ill., No. 3020. Opinion filed by Court of Claims, May term, 1937.

Yott vs. State of Ill., No. 3035. Opinion filed by Court of Claims, September term, 1937.

In the latter case attention is called to the fact that the legislature of Illinois, under the provisions of House Bill

No. 932, appearing in the Session Laws of 1937, Page 95, makes provision for adjustment in a matter of this character, by the Director of Finance. Claimant's attention is directed to said statute, and the application herein pending is hereby denied.

The motion of the Attorney General to dismiss the complaint is allowed.

(No. 3100- Claim denied.)

HARRY V. YOUNGBLUT, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 12, 1937.

FRANK R. EAGLETON, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—negligence of State employee—State not liable for. The State is not liable for damages to property or injuries to persons, caused by the negligence of its officers, servants or agents, the doctrine of respondent superior not being applicable to it.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks an award of Forty-five (\$45.00) Dollars. He alleges that on December 11, 1936 a State truck operated by employees in the Division of Highways, in a reckless, careless and improper manner, collided with claimant's car where same was parked in the City of Freeport, resulting in damages to the car, to the amount of Forty-five (\$45.00) Dollars. Claimant represents that the drivers of the State-owned truck are not financially responsible, own no property above their exemption rights, and that claimant is unable to collect either from property, wages or salary; further, that application for adjustment has heretofore been made with the Division of Highways, of the Department of Public Works, and has been informed by the then Director of such Department that he was without authority to settle such claim.

The Attorney General has filed a motion to dismiss on the ground that claimant seeks an award predicated upon the alleged negligent operation of a State truck by a State employee, for which there is no legal liability.

The court has been frequently called upon to consider claims of this character. The ruling has been repeatedly an-

nounced that "in the construction and maintenance of public highways the State exercises a governmental function and is not liable for damages to property or injuries to persons caused by the negligence of its agents, officers or employees. The doctrine of *Respondeat Superior* does not apply to the State." *Johnson vs. State*, 8 C. C. R. 67; *Trompeter vs. State*, 8 C. C. R. 141.

In the absence of any statute creating legal liability for such damage, we are of the opinion that the motion of respondent should be allowed. The motion of the Attorney General to dismiss the complaint is allowed and the cause is dismissed.

(No. 3091—Claim denied.)

ARTHUR B. PHILLIPS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 12, 1937.

ARLO E. BANE, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

MOTOR VEHICLE LICENSE FEE—claim for refund where use of vehicle for which issued discontinued during period for which issued—must be denied. The statute providing for the licensing of motor vehicles contains no provision for a refund of license fee, where licensee discontinues use of vehicle for which issued, during time or part thereof, for which issued.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant alleges in his complaint that he paid the State \$50.00 as the license fee for a 1937 Dodge truck; that the license plates which he received have never been used, that the seal enclosing the identification card has never been broken; that claimant sold said Dodge truck and did not operate the same since the issuance of said license to him; that he is ready, willing and able to return said license plates; and asks a refund of the license fee so paid by him as aforesaid.

The Attorney General has entered a motion to dismiss the claim on the following grounds:

1. That there is no statute authorizing the refund of the license fee so paid by the claimant as aforesaid.

2. That payment of such license fee was not made under protest, nor under a mistake of fact.

There is no provision of the Motor Vehicle Act, or any other Act, which authorizes a return of a license fee under the facts set forth in the complaint. Had the legislature intended that licensees should be entitled to a return of the license fees paid by them, in the event of a sale of the licensed car, they would undoubtedly have made provision to that effect.

It is not contended that the license fee was paid under duress or under a mistake of fact, and the rule is well settled that where a tax is paid voluntarily and without duress or compulsion, and with a full knowledge of the facts, it cannot be recovered back, in the absence of a statute authorizing such recovery. *Yates vs. Royal Insurance Co.*, 200 Ill. 202; *Board of Education vs. Toennigs*, 287 Ill. 469; *Richardson Lubricating Co. vs. Kinney*, 337 Ill. 122; *American Can Co. vs. Gill*, 364 Ill. 254.

The jurisdiction of this court is limited to claims in respect of which the claimant would be entitled to redress against the State, either at law or in equity, if the State were suable. *Crabtree vs. State*, 7 C. C. R. 207; *Kramer vs. State*, 8 C. C. R. 31; *Shumway vs. State*, 8 C. C. R. 43; *Titone vs. State*, No. 2475, decided at the January term, 1937, of this court.

Under the facts set forth in the complaint, claimant could not maintain an action against the State if it were suable, and therefore we have no authority to allow an award. The motion of the Attorney General must be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 3084—Claim denied.)

ANN MOFFETT, SEE ANN HOWE, Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed October 12, 1937.

JOHN E. BABB, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE,
Assistant Attorney General, for respondent.

PERSONAL INJURY—negligence—respondent superior, doctrine of not applicable to State. State is not liable for personal injuries suffered by person

while calling at office of Illinois Free Employment Bureau, caused by slipping and falling on linoleum which it is alleged was wet and slippery owing to negligence of employees of State, as the doctrine of respondeat superior is not applicable to the State, in the exercise of its governmental functions, and the conduct of such bureau being such a function.

SAME—claim for on grounds of equity and good conscience—when must be denied. An award on the grounds of equity and good conscience, on a claim based on the negligence of agents or servants of the State in the performance of a governmental function, cannot be allowed as the State would not be liable at law or in equity if it were suable thereon.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein represents that while calling at the Office of the Illinois Free Employment Bureau, on the third floor of the premises at 116 North Dearborn Street, in Chicago, Illinois, on the 10th day of October, A. D. 1934, she slipped and fell on a strip of linoleum which served as an aisle from the front to the rear of the office room of said Bureau; that the cause of the fall was that the floor had been mopped a short time prior to her visit, and was in a wet and slippery condition. Claimant remained at home for two weeks, during which time her left knee became sore and swollen, and thereafter, on October 30, 1934, while she was in the Boston Store, in Chicago, the knee collapsed and she was removed to the County Hospital, where she received treatment and an operation and remained until June 4, 1935. Suit was filed by her in the Superior Court of Cook County against Dibblee and Manierre as owners of the building where the Employment Bureau was located, and such sum was eventually settled for the sum of One Hundred Twenty-five (\$125.00) Dollars. She now seeks an award from the State in the sum of Ten Thousand (\$10,000.00) Dollars, to compensate her for the lame and crippled condition and medical care alleged to have been incurred as a result of such accident.

The Attorney General has filed a motion to dismiss the complaint for the reason that same is predicated on an alleged liability of respondent while engaged in a governmental function, and for the negligent and wrongful acts of its officers, agents or employees.

This court has been frequently called upon to pass upon claims based upon such allegations.

In the case of *Kramer vs. State*, 8 C. C. R. 31, the court, in denying an award, said:

"The right to recover is based upon the theory that it was the duty of the State to maintain and keep the floor in question in proper and safe condition; and even though the State is not liable for the negligence of its servants and agents, nevertheless an award should be made as an act of social justice and equity.

"It is a well established principle of law in the courts of this and other states that the State is not liable for the negligence of its officers, servants or agents in the performance of governmental functions; neither can this court allow an award as a matter of social justice and equity in any case where the State would not be liable at law or in equity if the State were suable. The latter proposition is considered at length in the case of *Crabtree vs. State*, 7 C. C. R. 207."

The views expressed in the two foregoing cases are decisive in the present matter. The motion of the Attorney General to dismiss the complaint is allowed and the complaint is dismissed.

(No. 2485—Claim denied.)

ANNA PECK, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 12, 1937.

BUSCH & HARRINGTON, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—burden of proof in claims under. The general rule of law that the burden of proof is upon the plaintiff to prove his case by a preponderance or greater weight of the evidence is applicable to claims under the Workmen's Compensation Act.

SAME—claim under—what must be shown. In order to recover compensation under the Act it must be shown that the injury complained of was accidental, that it arose out of and in the course of the employment of the injured, and that he was at the time of the injury, engaged in employment which was extra hazardous in fact, or declared to be under the Act.

SAME—evidence—statements of deceased employee to physician and others incompetent to prove accidental injury was sustained—when award denied. Statements of a deceased employee to a physician and other persons are not competent to prove that an accidental injury was sustained, or to prove cause of injury, or that it was due to an accident arising out of and in the course of employment of deceased; and where such statements are the only evidence in support of a claim for compensation, as to cause of injury resulting in death, there is no competent proof that such injury was an accidental injury arising out of and in the course of employment and an award for compensation must be denied.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

For about nine months prior to June 14th, 1934, Sherman Earl Peck was regularly employed at the University of Illinois in the Physical Plant Department, as a janitor. On June 7th, 1934 he worked in the basement of the New Gymnasium helping to place chairs on the floor for commencement exercises, and on June 9th, 1934 he worked from 9:00 p. m. to 11:00 p. m. in the Quadrangle and the University Auditorium removing chairs and band equipment after the president's reception. The chairs were conveyed on a small truck and were piled thereon in such manner that the top of the load was about level with the chest of the mover, or somewhat higher.

Claimant, who is the widow of said Sherman Earl Peck, contends that Mr. Peck was struck in the side while moving chairs as above set forth, and that the injury so received was the cause of his death which occurred on June 20th, 1934.

About June 1st Mr. Peck suffered with abdominal distress and consulted his family physician, Dr. Dalton, who diagnosed the trouble as chronic appendicitis. Mr. Peck, however, continued with his work until June 14th. While at work on that date he suffered considerable pain, accompanied by a swelling on his right side in the region of the appendix, which swelling he showed to some of his fellow workmen. He telephoned Dr. Dalton from his place of work, and then went home. The doctor called at Mr. Peck's home, and had him immediately taken to the hospital, where the doctor operated at once, with the idea in mind that the patient was suffering from an attack of appendicitis.

However, as the result of such operation, it was found that the appendix was practically normal; that there had been an acute hemorrhage in the abdominal wall; and that there was evidence of a severe bruising of, or trauma to the abdominal muscles, although there was no discoloration or other external evidence thereof. The bruised area was about two inches in diameter. The hemorrhage extended down deep into the muscle, and required packing of the wound to control the hemorrhage. The swollen area was right over the appendix region, and was in the abdominal wall itself, between the outer and inner abdominal walls. Following the opera-

tion, septicemia developed and Mr. Peck died on June 20th, 1934.

Dr. Dalton, the attending physician, originally diagnosed the case as chronic appendicitis, but testified on the hearing that the operation disclosed that the appendix was practically normal, and that the cause of death was septicemia due to an infection of the abdominal wall, and that the septicemia was brought about by an injury to the abdominal wall.

From the evidence in the record, there is no question but what the employer and employee were both operating under the terms and provisions of the Workmen's Compensation Act, and the only question involved in this case is the question of whether the claimant's intestate sustained an accidental injury which arose out of and in the course of his employment, and if so, the amount of the compensation which is to be paid on account of his death.

The only testimony offered by the claimant to show that Mr. Peck sustained accidental injuries which arose out of and in the course of his employment was the testimony of Dr. A. J. Dalton, the attending physician; Reverend E. H. Heicke, and Anna Peck, claimant herein. The testimony of Dr. Dalton and Reverend Heicke was based upon statements made to them by Mr. Peck after the operation, to wit, either five or seven days after the date of the injury, and the testimony of Mrs. Peck was based upon statements made to her by her husband after he returned home from work at the University on the day on which the injury is alleged to have been sustained. None of these statements are part of the *res gestae*, and consequently none of such statements are competent evidence in the case.

Claimant maintains that the testimony of Dr. Dalton as to the statements made to him by Mr. Peck was properly admissible, and cites the case of *Cunco Press Co. vs. Ind. Com.*, 341 Ill. 572, in support of her contention. An examination of that case, however, discloses that the statements made to the doctor in that case were with reference to the part of the employee's body which was injured, and not with reference to the cause of the injury.

The rule is stated in Angerstein's "The Employer and the Workmen's Compensation Act," Page 79, Section 43, as follows:

"The statements of a deceased employee either to a physician or to other witnesses, are not competent to prove that an accidental injury was sustained, or to prove the cause of the injury, or that it was due to an accident arising out of and in the course of the employment."

There is, of course, an exception to this rule in the case of statements which are a part of the *res gestae*, but clearly none of the statements to Dr. Dalton, to Reverend Heicke, or to Mrs. Peck were part of the *res gestae*.

The case of *Spiegel's H. F. Co. vs. Ind. Com.*, 288 Ill. 422, was very similar to the present case. In that case the court said:

"No one saw Cloyes (the employee) receive the injury, and he did not tell his employer or any of his fellow employees about receiving it. The only proof that the injury arose out of and in the course of his employment was (1) the testimony of his widow and of his physician that he had told them he received his injury at his employer's store while passing through a narrow aisle while showing customers goods in plaintiff in error's store, and by striking his arm just above the elbow, against a sharp corner of a dresser."

* * * * *

"The sole question raised in this case is whether or not there is any competent evidence in the record showing that the death of Cloyes was caused by an injury which arose out of and in the course of his employment. The oral testimony bearing upon that question, heard before the arbitrator and the Industrial Commission over the plaintiff in error's objection, was hearsay and incompetent. That testimony consisted of statements of the witnesses of what the deceased told them about when, where and how he received the injury and what he was doing at that time. No one testified who had any knowledge of those facts except from the statements made to them by the deceased. Declarations made by one injured, to his attending physician, are admissible when they relate to the part of his body injured, his suffering, symptoms and the like, but not if they relate to the cause of the injury. This rule is more rigorously enforced when applied to lay witnesses. *Chicago and Alton Railroad Co. vs. Industrial Commission*, 274 Ill. 336."

After considering other points raised, the court said: "There is no competent evidence in the record tending to prove that the injury to deceased arose out of and in the course of his employment."

Although Mr. Peck was working with five other janitors, he did not mention the fact of his injury to any of them, and none of them knew or heard that he sustained an injury. Before he left for home on the night he was operated, he showed some of his fellow employees a swelling on his side, but did not say anything to them with reference to the cause

of such swelling, and did not mention anything about having received an injury while at work.

The claimant also relies upon the following statement in the stipulation of facts herein, to wit:

"That the said Sherman Earl Peck at the time of the injury, was working with several other employees of the University of Illinois all employed by the physical plant department, assisting in moving chairs and other equipment."

It would be far-fetched construction of the foregoing statement, if it were construed to be an admission of the fact that Mr. Peck sustained an accidental injury, but even if it could be so construed, it would be an admission of one of the ultimate facts in the case, and the stipulation by its terms was not intended to cover any question of ultimate liability. Section 13 of such stipulation provides as follows:

"That the sole intent of this stipulation is to set forth accurately a portion of the material facts in this cause; that nothing herein is to be taken as an attempt to fix or determine any question of ultimate liability."

Furthermore, such stipulation provides that it is subject to the approval of the Attorney General, but it does not bear such approval.

The burden of proof is upon the claimant to show that Mr. Peck sustained accidental injuries which arose out of and in the course of his employment. Such proof may be established either by direct or circumstantial evidence. *Porter vs. Industrial Commission*, 301 Ill. 76-78.

In this case, however, all of the competent evidence in the record, both direct and circumstantial, together with all of the inferences which may reasonably be drawn therefrom, fails to establish the fact that said Sherman Earl Peck sustained an accidental injury which arose out of and in the course of his employment.

Claimant also takes the position that even if there were no legal liability on the part of the State, she is entitled to an award on the grounds of equity and good conscience. The question of the right of this court to allow an award solely on the grounds of equity and good conscience was fully considered in the case of *Crabtree vs. State*, 7 C. C. R. 207, in which we held that the jurisdiction of this court to allow an award is limited to claims in respect of which the claimant would be entitled to redress either at law or in equity if the State were suable. The decision of the court in the *Crabtree*

case has been followed in many, many cases since that time and is now the well established rule of this court. *Kramer vs. State*, 8 C. C. R. 31; *Shumway vs. State*, 8 C. C. R. 43; *Titone vs. State*, No. 2475, decided at the January term, 1937.

Under the facts in the record, we have no authority to allow an award.

Award denied. Case dismissed.

(No. 2484—Claim denied.)

FRANK DURKIEWIECZ, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 12, 1937.

BROWN, HAY & STEPHENS, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

PERSONAL INJURY—property damage—sustained as result of negligence of employees of State—State not liable for—doctrine of respondent superior not applicable to State—equity and good conscience, when award on grounds of cannot be made. The facts in this case are similar to those in Garbutt, Adm'r. vs. State, No. 2246, supra, and the opinion in that case is controlling herein.

MR. JUSTICE LINSFORT delivered the opinion of the court:

On the morning of June 22d, 1934, the claimant was driving his Chevrolet truck in a northerly direction on S. B. I. Route No. 4, a short distance south of the Village of Elwood, in Will County, Illinois. It had been raining for some time, the pavement was wet, and the visibility was somewhat limited.

The evidence on the part of the claimant is to the effect that he was driving at a speed of about fifteen miles per hour, that his brakes were in good condition, and that there was no evidence of any mechanical defect in the operation of his truck immediately preceding the accident.

The evidence for the claimant is also to the effect that as he was proceeding in a northerly direction, another automobile with a trailer attached was approaching from the north, moving at a speed of ten or fifteen miles per hour; that as claimant's truck and the automobile and trailer were about to pass each other, a light Ford convertible coupe owned by respondent and driven by an associate director of the De-

partment of Finance in the discharge of his official duties, approached rapidly from the north at a rate of speed in excess of fifty miles per hour; that the State automobile turned to the left in an attempt to pass the automobile and trailer just as claimant's truck was approaching from the south; that when the driver of the State car saw the claimant's truck approaching, he attempted to turn back into his own traffic lane, but on account of the condition of the pavement and the speed at which he was traveling, he lost control of the car, which skidded and collided with the claimant's truck, forcing the same off the highway and across the ditch on the east side of the road, whereby the claimant sustained severe and permanent injuries and his truck was damaged and destroyed.

There is evidence on behalf of the respondent to the effect that the State car just prior to the accident was traveling at a speed of thirty or thirty-five miles per hour; that the automobile and trailer hereinbefore referred to was parked on the highway, and in attempting to avoid a collision there-with the driver of the State car applied his brakes, whereby his automobile skidded, swerved first to the right and then to the left, and finally came to a complete stop while still on the road, but at right angles with the edge thereof; that while in this position the claimant's truck collided with the State automobile and forced the latter off the highway and into the ditch, damaging the same to a considerable extent.

The claimant bases his right of recovery on two grounds:

1. That the accident in question was the result of the gross, reckless, wanton or wilful negligence of the servant of the State of Illinois.

2. That in any event he should be entitled to an award on the grounds of equity and good conscience.

The Attorney General contends that the State is not liable for the negligence of its servants and agents in the absence of a statute making it so liable.

Claimant concedes that the general rule is in accordance with the contention of the Attorney General, but maintains that an exception to such rule exists in those cases where the State is guilty of wilful and wanton misconduct, and the claimant himself is free from contributory negligence, and that in such cases an award is justified.

In the past there have been some decisions of this court in which such an exception was recognized, but such decisions

have been overruled and such exception is no longer recognized by this court.

In denying a petition for rehearing in the recent case of *George Franklin Garbutt, Admr. vs. State*, No. 2246, decided at the present term of this court, the court, in disposing of the same contention, said:

"If the State is not liable for the ordinary negligence of its servants and agents, there is no principle of law under which it can be held liable for the gross or wanton negligence of such servants and agents, in the absence of a statute making it so liable. The purported exception has no basis in law, and is no longer recognized by this court."

We have repeatedly held that we have no authority to allow an award in any case unless there would be a liability on the part of the State, either at law or in equity, if the State were suable. *Crabtree vs. State*, 7 C. C. R. 207; *Kramer vs. State*, 8 C. C. R. 31; *Shumway vs. State*, 8 C. C. R. 43; *Titone vs. State*, No. 2475, decided at the January Term, 1937.

Under the law as above set forth, we have no authority to allow an award, and the same must therefore be denied.

Award denied. Case dismissed.

(No. 2476—Claim denied.)

CHARLES H. HOFF, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 12, 1937.

R. N. INGELSON, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—sustained as result of negligence of employees of State—State not liable for—doctrine of respondent superior not applicable to State—equity and good conscience, when award on grounds of cannot be made. The facts in this case are similar to those in *Garbutt, Admr. vs. State*, No. 2246, *supra* and the opinion in that case is controlling herein.

MR. JUSTICE LINSBOTT delivered the opinion of the court:

Claimant alleges in his complaint that on June 17th, 1934 he was driving his automobile on S. B. I. Route No. 6 about five miles east of the City of Morris, Illinois, and was in the exercise of all due care and caution for his own safety; that at the time and place aforesaid, the shoulder on said highway was maintained by the respondent in a defective and danger-

ous condition; that as the result of the carelessness and negligence of the respondent in the maintenance of the shoulder on said highway as aforesaid, the automobile in which the claimant was riding, was caused to turn over and was thereby demolished; by reason whereof he claims damages.

The Attorney General has moved to dismiss the case for the reason that there is no liability on the part of the State for the acts of its servants and agents under the doctrine of respondent superior in the absence of a statute making it so liable.

Claimant admits that the general rule is as stated by the Attorney General, but contends that the negligence of the respondent was wilful and wanton, and that an exception to the general rule exists in such cases.

This identical question was raised and fully considered by the court on rehearing in the case of *George Franklin Garbutt, Admr. vs. State*, No. 2246 (opinion on rehearing filed at the present term of this court) and we there held adversely to the contention of the claimant. In that case we said:

"If the State is not liable for the ordinary negligence of its servants and agents, there is no principle of law under which it can be held liable for the gross or wanton negligence of such servants and agents, in the absence of a statute making it so liable. The purported exception has no basis in law, and is no longer recognized by this court."

Our jurisdiction is limited to claims in respect of which the claimant would be entitled to redress against the State either at law or in equity if the State were suable.

We have no authority to allow an award under the allegations of the complaint and the motion of the Attorney General must therefore be sustained.

Motion to dismiss allowed. Case dismissed.

(Nos. 2342-2343-2349, Consolidated, Claims denied.)

IRENE BLAIR MAXWELL, No. 2342. MARY BLAIR, ET AL., No. 2343 AND ARTHUR LAYTON, No. 2349. Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 12, 1937.

T. N. CORER, for claimants.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Attorney General, for respondent.

Negligence--employees of State--State not liable for. The State is not liable for damages for personal injuries or damage to property, sustained as the result of the negligence of one of its employees in the operation of one of its trucks, the doctrine of respondent superior not being applicable to the State.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

All of the above cases arise out of the same accident and involve the same facts, and are therefore consolidated for the purpose of this hearing.

It appears from the several complaints herein that on August 7th, 1933 the claimant, Arthur Layton, was driving his automobile in an easterly direction on Harrison Street in the City of Charleston, and was approaching the intersection of said Harrison Street with S. B. I. Route No. 130. Harrison Street extends in an easterly and westerly direction and S. B. I. Route No. 130 extends in a northerly and southerly direction.

The claimants, Mary Blair, Eliza Blair, Charles Blair, Dorothy Blair, June Blair, and Irene Blair Maxwell were riding as passengers in said automobile. The several complaints further allege that as said Arthur Layton was crossing the aforementioned intersection of Harrison Street and S. B. I. Route No. 130, a certain State truck driven by one of the servants and agents of the respondent, and carrying certain employees of the respondent, was being driven in a northerly direction on said S. B. I. Route No. 130 in a careless and negligent manner, and at a high and dangerous rate of speed, to-wit, at a speed of sixty miles per hour, whereby, and as a result of the carelessness and negligence of the servant and agent of the respondent in the operation of said State truck as aforesaid, said truck ran into and struck the automobile in which the several claimants were riding as aforesaid, and they were each and all seriously and permanently injured.

The Attorney General has entered a motion to dismiss each case for the reason that the State is not liable under the facts set forth in any of the complaints.

This court has repeatedly held that the State in the maintenance of its hard-surfaced highways, is engaged in the exercise of a governmental function and that in the exercise of such functions, it is not liable for the negligence of its serv-

ants and agents in the absence of a statute making it so liable. *Schweizer vs. State*, 8 C. C. R. 432; *Wright vs. State*, No. 1981, and *Joe Boner, et al. vs. State*, No. 2529, both decided at the September Term, 1935.

We have also repeatedly held that we have no authority to allow an award in any case unless there would be a liability, either at law or in equity, on the part of the State, if the State were suable. *Crabtree vs. State*, 7 C. C. R. 207; *Kramer vs. State*, 8 C. C. R. 31; *Shumway vs. State*, 8 C. C. R. 43.

There is no law authorizing a recovery under the facts set forth in any of the complaints, and the several motions of the Attorney General must therefore be sustained.

Each motion to dismiss is allowed, and each of the consolidated cases is dismissed.

(No. 2103 - Claim denied.)

JOHN H. RAY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 15, 1935.

Rehearing denied, October 12, 1937.

LEO P. BAIRD AND L. FRED O'BRIEN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*making claim for compensation within time provided in, is jurisdictional.* Making claim for compensation and filing application for compensation within time fixed by Workmen's Compensation Act, is a condition precedent, without which, court is without jurisdiction to proceed with hearing.

SAME—*payment of wages during illness of employee, not payment of compensation.* Payment of the employee's wages during his illness is not the payment of compensation, within the meaning of the statute allowing claim for compensation to be made, within six months after payments of compensation under the Act have ceased, where such wages were paid and accepted without reference to any claim for compensation.

SAME—*furnishing medical, surgical or hospital services by employer--not admission by employer of liability to pay compensation--not payment of compensation.* Furnishing by employer to employee of first aid medical and surgical services and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury, is not an admission of liability on the part of the employer to pay compensation, and the furnishing of any such services by employer is not the payment of compensation.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

John H. Ray, the plaintiff, had been in the employ of the State of Illinois for several years in the Highway Department. On March 6, 1930 he was operating a gravel and dirt highway grader, which was being drawn by tractor on a public highway between the Counties of Knox and Peoria. He was standing on the rear end of the machine, which was proceeding in a southerly direction, when one W. G. Anderson, driving an automobile also in a southerly direction struck the grader and knocked the claimant to the ground, where he landed upon his head and shoulders.

At the time of the injuries, claimant was receiving \$125.00 per month and received that sum from the time of his injuries until he returned to his employment, and was carried on the monthly payroll of the State at \$125.00 per month until May 12, 1931. He was then placed upon an hourly basis and was paid about \$40.00 per month from May 12, 1931 until November 25, 1931, when his services were terminated by State officials, for the reason that his services were of such a nature that they were entirely insufficient and unsatisfactory to the department.

He filed his suit for the May Term, 1931 in the Circuit Court of Warren County against Anderson, and upon a trial of that case by a jury, was awarded the sum of \$100.00 damages, but has failed to collect that.

This claim was filed with the clerk of this court on April, 1933. Numerous injuries were alleged and damages claimed in the sum of \$4,925.00. Because of the view that we take of this case, it will be unnecessary for us to determine the extent of claimant's injuries or the amount of damages.

From the above, it will be noted that he was injured on the 6th day of March, 1930 and claim filed on April 3, 1933, more than three years after the alleged injuries.

Under the authority laid down by the Supreme Court of Illinois in the case of *Lewis vs. Industrial Commission*, 357 Ill. 309, an opinion filed on June 15, 1934 and re-hearing denied October 3, 1934, it is held that a claim for compensation is not made within six months, as required by Section 24 of the Workmen's Compensation Act, where the employee returned to work after the injury, worked for several months, no claim for compensation being made during the six months

following the injury, and payment of the employee's wages to his wife during his illness and up to the time of his death, the same is not the payment of compensation within the meaning of the statute allowing claim to be made within six months thereafter, where such wages were paid and accepted as wages without reference to any claim for compensation. In this case, the facts are the same. Ray received his wages, and although his wages were reduced after a time, it appears that all sums were paid to him as wages.

Section 24 of the Workmen's Compensation Act declares that no proceeding for compensation shall be maintained unless claim has been made within six months after the accident, or, in the event that payments have been made under the provisions of the act, unless written claim has been made within six months after such payments have ceased and a receipt therefor or a statement of the amount of compensation paid shall have been filed with the commission. The section concludes with the proviso that, in any case, unless written claim for compensation is filed within one year after the date of the last payment of compensation, the right to file an application therefor shall be barred. Subdivision (a) of Section 8 provides that the furnishing by an employer of first aid medical and surgical services and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury, shall not be construed as an admission of liability on the part of the employer to pay compensation, and that the furnishing of any such services shall not be construed as the payment of compensation.

The Supreme Court in the Lewis case and other cases, held that the making of a claim for compensation within the prescribed period is jurisdictional and a condition precedent to the right to maintain a proceeding under the statute.

This court has held in *Crabtree vs. State of Illinois* that making claim for compensation in this court and filing application for compensation within the time fixed by the Workmen's Compensation Act is a condition precedent, without which this court is without jurisdiction to proceed with the hearing.

We, therefore, hold that we have no jurisdiction in this case, and claim is accordingly dismissed.

ADDITIONAL OPINION ON PETITION FOR REHEARING.

MR. JUSTICE LINSOTT delivered the opinion of the court:

A petition for rehearing was filed in the above entitled cause. It is claimed that certain points were overlooked, one of them being that the court stated that Mr. Ray filed his suit for the May Term, 1931 in the Circuit Court of Warren County against Anderson (Anderson being the defendant in this suit brought to recover damages for Ray's injury), and upon a trial of the case by a jury, was awarded the sum of \$100.00 damages, but has failed to collect it. That statement was taken from the sworn declaration or petition filed in this case, and it was assumed by the court that if payment of the \$100.00 was afterwards made, that an amendment would have been made to the declaration or petition. While it is true that Mr. Ray did testify that the \$100.00 was paid, it is likewise true that the mis-statement in the opinion was not entirely the fault of the court.

The petition for rehearing also relies upon a statement made by Fred Tarrent to the effect that from the time of Ray's injury, March 6, 1930 to the date of his release on November 25, 1931, Mr. Ray was paid a total sum of \$2,233.07, only a part of which was earned by his services to the department, and it appears that he was incapacitated by the injury. There is nothing in the statement which shows which part was earned or unearned. Mr. Tarrent also stated that it was his opinion that Ray was entitled to some compensation. From Mr. Tarrent's statement, it appears that he did receive some compensation.

It is also contended that another letter from Mr. Tarrent addressed to L. Fred O'Brien, stated that he, Mr. Tarrent and others connected with the Highway Department, met with Mr. Ray and discussed the details of procedure outlining to him specifically the course necessary for him to follow and explaining that it was necessary for him to attempt to collect damages from Mr. Anderson before he could file his case in the Court of Claims for damages. Assuming that Mr. Tarrent did make such a statement, that is not the law and could not be followed by this court. It is also argued that Mr. Tarrent stated: "During this entire period and for a considerable length of time afterwards, Mr. Ray was carried on the monthly payroll at \$125.00 a month which was his stipulated

salary. He did practically no productive work on his maintenance section during this entire period."

Mr. Ray's testimony on this, however, is in conflict. He says that from March 6, 1930, he was confined at home and did not report for duty for approximately four months. "I returned to duty after four months. After I returned to duty, I supervised the work. I did not attempt to do any manual labor. My duties consisted of just overseeing the work; going over the road, patrolling the road every day from one end to the other, round trip. I would have men working in different places at the job. During that time, I furnished my own car and my own gasoline. I received from salary or compensation from March 6, 1930 until March 12, 1931, \$125.00 per month." This is misstated in the abstract, but it appears from Ray's testimony that he received \$125.00 per month until May 12, 1931; until he was released from the service of the department on November 25, 1931, he received \$458.07 at the rate of forty cents per hour. This money was received on account of his employment. He also testified that Mr. Heffner of the Peoria District Office gave him notice that his services would terminate on the 25th of November, 1931, and he was then informed that he wasn't able to do the work and that they had to get someone in the department who could.

In the petition for rehearing it is stated that they rely upon the case of *Kennedy vs. State of Illinois*, 7 C. C. R. 260, and it is contended that the facts in the Kennedy case are in point with the facts in the case at bar, and in that case this court said: "The evidence discloses that claimant was paid compensation in the amount of Three Hundred Seventy-five Dollars (\$375.00). Such payment at the rate which claimant was entitled to receive, to-wit, Fourteen Dollars and Forty-two Cents (\$14.42) per week, paid his compensation from the day after the accident to March 27th, 1932. The record shows that the declaration herein was filed in this court on February 14th, 1933."

Under Section 24 of the Compensation Act, which we are bound to consider, application for compensation must be filed within one year after the date of the injury or within one year after the date of the last payment of compensation.

According to Ray's testimony, the last compensation that he received, whether he now contends was for services

rendered or strictly compensation, was November, 1931. This claim was filed on April 3, 1933. Manifestly, we have no jurisdiction in the case, but even if we had jurisdiction, when we take into consideration the medical testimony of the claimant himself, we would be compelled to deny an award.

Dr. E. E. Barbour on cross-examination stated that he never saw the claimant until the 24th, 25th and 26th of September, 1930, when he examined him, and that was the only examination he made; that he did form an opinion but it was the result of talking with others, and that he couldn't tell at that time how extensive a wound the claimant had received, and that would have something to do with his opinion. He also stated that the extent of the injury might, or might not make some difference in his opinion. He also stated that the dizziness complained of by the claimant was not necessarily due to an accident. The claimant was 68 years old at the time of the injury, and this Doctor stated that men of that age are apt to have dizzy spells as a natural proposition and not attributable to any accident. He also stated that the cause of his dizziness might have been due to something that occurred after the date of the injury and before his examination.

Dr. C. J. Hyslop was called and his direct examination was conducted by Mr. O'Brien. He was Fifth District Health Supervisor of communicable diseases under Public Health Department and employed by that department. He gave the claimant a cursory examination, which consisted of a general examination without taking blood tests, urinalysis, X-ray, seeing plates, or any laboratory work. He stated that he observed a man of about 70 years. Dr. Hyslop made a superficial neurological examination, and found a man well preserved, well nourished, weighing about one hundred seventy pounds, and apparently in fairly good health, suffering from a cataract on the right eye—slight cataract on both eyes. His heart was negative, and his blood pressure was 162/104, a little high for his age; no romberg sign and his coordination was fairly good. After bending his body, he is slightly unsteady, but in a minute or less, his coordination is very good. His walk is fairly normal; not very much hesitancy, no limp and no cane. Dr. Hyslop stated that in his opinion, for a man of Mr. Ray's age, he is in apparently very good physical condition, and guessed that he had an expectancy of at least eight

years. He thought he could only perform light manual labor. He stated that he was about fifty per cent efficient. On cross-examination he stated that he got around as a man of his age would get around, and his reaction after bending over was about normal for a man of his age, and stated that from his diagnosis he would say that the claimant had arterie sclerosis with beginning senility, with a chronic nephretis and a prostatic involvement, which is natural to assume in a man of his age, and which he found. His blood pressure, which is higher than normal, corroborates this statement. He further testified that these pathological conditions were no more attributable to trauma, that might have been occasioned two or three years ago, than to ordinary senility.

In a personal injury case, the claimant was given an award by the jury in the sum of \$100.00. Whether this award was paid or not paid is immaterial in this case. We assume that the same medical testimony, at least by one witness it is true, was given at the trial of the personal injury case as was given here. It is quite apparent that the jury and the court that tried the case was of the opinion that Mr. Ray's injuries were in fact not as serious as he alleged in his claim in this court, but be that as it may, this court is bound by Section 24 of the Compensation Act, and because application for compensation was not filed within one year after the date of the injury or within one year after the date of the last payment of compensation, the right to file such application is barred, and we hold that we would have no jurisdiction in this case to grant compensation.

(No. 2235—Claim denied.)

WILLIAM J. BOMKAMP, ADMINISTRATOR OF THE ESTATE OF RAYMOND BOMKAMP, DECEASED, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 12, 1937.

CLIFFORD G. ROE and CHARLES J. TRAINOR, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*alleged to have been caused by agent of State -- State not liable for.* The State is not liable for damages for personal injuries sustained by reason of the malfeasance, misfeasance or negligence of its officers, agents or servants in the exercise of its governmental functions.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The complaint herein alleges that prior to and on the 18th day of August, A. D. 1932, Raymond Bomkamp was a student at the Morton Park High School in Cicero; that the school authorities of the Town of Cicero, in co-operation and conjunction with the Department of Commerce of the State of Illinois had inaugurated and was then conducting as a part of the curriculum of said school, studies in aeronautics and mechanics, under the direction and supervision of a Mr. Stiver; that the salary of said Stiver was paid by the State of Illinois and the Township of Cicero, in equal portions; that said studies in aeronautics and mechanics did not include the art of flying or controlling an airship; that said Stiver was possessed of an airship and at times took students of the school on flying expeditions; that on said 18th day of August, 1932, said aeroplane was not in good working order and condition, but was in bad condition and unsafe for flying, and had been in that condition for a long time prior thereto; that the unsafe condition of said aeroplane was known to the authorities of said School District of Cicero, and to the "authorities of the State of Illinois"; that the authorities of said School District also knew that said Stiver had taken his students for rides in said defective aeroplane on divers occasions.

That on said 18th day of August, 1932, said Raymond Bomkamp was riding in said machine at the request of said Stiver; that when said machine was at an altitude of several hundred feet, by reason of the defective condition thereof, it fell and both Stiver and Raymond Bomkamp were killed; that the claimant's intestate was at all times in the exercise of due care and caution for his own safety; that claimant is the duly appointed, qualified and acting administrator of the estate of said decedent, and seeks to recover the sum of \$10,000.00 as the pecuniary damages sustained by the next of kin of said decedent by reason of his death.

The Attorney General has moved to dismiss the case on the ground that there is no liability on the part of the State under the facts set forth in the complaint.

The basis of the claim against the State is not entirely clear. It is difficult to determine whether claimant contends that Stiver was an agent of the State, and that he was guilty

of negligence in the operation of the aeroplane, for which the State is liable;—or whether he contends that the “authorities of the State of Illinois” were negligent in permitting Stiver to take students for rides in an aeroplane which they knew to be defective. In either event there is no liability on the part of the State. Even if it be conceded that the State was co-operating with the Morton Park High School in conducting studies in aeronautics and mechanics, as set forth in the complaint, such work would constitute the exercise of a governmental function. The rule that in the exercise of its governmental functions the State is not liable for the negligence of its servants and agents, has been applied so often by this court, that the citation of authorities is unnecessary.

We have also repeatedly held that we have no authority to allow an award in any case unless there would be a liability on the part of the State, either at law or in equity, if the State were suable. *Crabtree vs. State*, 7 C. C. R. 207; *Kramer vs. State*, 8 C. C. R. 31; *Shumway vs. State*, 8 C. C. R. 43.

There being no liability on the part of the State under the facts set forth in the complaint, we have no authority to allow an award.

The motion of the Attorney General must therefore be sustained.

Motion to dismiss allowed. Case dismissed.

(Nos. 2228-2229-2230, Consolidated—Claims denied.)

LORA SPURRELL, No. 2228, LORA SPURRELL, ADMINISTRATRIX OF THE ESTATE OF MURIEL SPURRELL, DECEASED, No. 2229 AND VESTA ROWLEY, No. 2230, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 12, 1937.

HAROLD METCALF, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY—negligence of employees of State in failing to maintain highway in safe condition, causing—State not liable for—award for damages for on grounds of equity and good conscience cannot be made. The facts in this case are similar to those in the case of *Garbutt, Adm'r. etc. vs. State*, Case No. 2246, *supra*, and the decision in that case is controlling herein.

MR. JUSTICE LANSFORD delivered the opinion of the court:

All of the above cases grow out of the same accident, involve the same facts, and are governed by the same principles

of law, and they have therefore been consolidated for the purposes of this hearing.

On the evening of August 17th, 1932, between seven and eight o'clock, the claimant Lora Spurrell was driving a certain 1926 model Dodge sedan in a northerly direction over S. B. I. Route No. 85 in Mercer County, at a speed of about thirty miles per hour. Muriel Spurrell, aged five years, daughter of said Lora Spurrell, and Vesta Rowley, sister of said Lora Spurrell, were also riding in said automobile. As Lora Spurrell drove her said car over the brow of a hill, she drove onto a strip of gravel or crushed rock in a space which had not been paved, and her automobile swerved and skidded, causing her to lose control thereof, whereby the automobile overturned, and as a result thereof, the said Muriel Spurrell was killed and the said Lora Spurrell and Vesta Rowley were each seriously and permanently injured.

The complaint in each case alleges that the respondent was negligent in not having a warning signal posted upon the highway a reasonable distance beyond the approach to the graveled portion, notifying the traveling public thereof; and that the respondent was also negligent in permitting and allowing gravel and crushed rock to be and remain on said highway at the point in question, thereby making it difficult and dangerous for drivers of automobiles.

The Attorney General has entered a general demurrer in each of said cases, which under the present practice will be considered as a motion to dismiss.

We have held in numerous cases that in the maintenance of its hard-surfaced roads, the State of Illinois is engaged in a governmental function, and have also held that the State in the exercise of its governmental functions, is not liable for the carelessness and negligence of its servants and agents, in the absence of a statute making it so liable. *George McCready, et al vs. State*, No. 2604, decided at the September term, 1935; *Lester A. Royal vs. State*, No. 2595, decided at the September term, 1935; *Peter Tivnan vs. State*, No. 3051, decided at the May term, 1937; *Cecil W. York vs. State*, No. 2701, decided at the May term, 1937.

There is no statute making the State liable under the facts set forth in the several complaints herein, and therefore we have no authority to allow an award.

Claimant also asks for an award on the ground of equity and good conscience. The right of this court to allow an award solely on the grounds of equity and good conscience was considered in the case of *Crabtree vs. State*, 7 C. C. R. 207, in which, after a consideration of the authorities on the subject, we held that the jurisdiction of this court to allow an award is limited to claims in respect to which the claimant would be entitled to redress against the State, either at law or in equity, if the State were suable. The doctrine there laid down has been approved in numerous cases since that time and is now the well-established rule of this court. *Crabtree vs. State*, 7 C. C. R. 207; *Kramer vs. State*, 8 C. C. R. 31; *Shumway vs. State*, 8 C. C. R. 43.

Under the law as above set forth, we have no authority to allow an award in any of the above cases.

The motion to dismiss in each case is allowed, and each of the above cases is dismissed.

(No. 1689—Claim denied.)

IDA M. YATES, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 12, 1937.

L. O. WILLIAMS, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*making claim for compensation within time required by Section 24 of Act, condition precedent to jurisdiction of Court.* Making claim for compensation and filing application for same within time fixed by Section 24 of Workmen's Compensation Act, is a condition precedent, without which the Court is without jurisdiction to proceed with hearing on claim.

SAME—limitations—Section 10 of Court of Claims Act, inapplicable in claims under—Section 24 of Workmen's Compensation Act controls. In claims by State employees for compensation for accidental injuries arising out of and in the course of their employment, Section 24 of the Act is controlling and Section 10 of Court of Claims Act, allowing claims to be filed against State within five years after accrual is inapplicable.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

On the 30th day of October, 1928, and prior thereto, claimant, Ida M. Yates, was employed at the Illinois Orphans' Home located in the City of Normal, McLean County, Illinois,

as a worker and an attendant in that institution; that in the course of her employment, she was required to wash the walls in certain rooms of that institution, and on the date last mentioned, while standing on a table that was provided for her, and while washing walls, she fell from the table and received a severe hip injury, consisting of a fracture of the hip, leaving when healed, that limb shorter than the other.

In view of the position that we take of the case, it is unnecessary to go into further detail as to the nature of the injury. This claim was filed December 15th, 1930.

The Attorney General has made a motion to dismiss this case for the reason that it appears from the evidence that no compensation or pay was ever made to the claimant, and claim for compensation was not made within six months, and claim was not filed within one year, pursuant to the terms of Section 24 of the Compensation Act. The Court of Claims Act provides that the Court of Claims shall hear and determine all cases resulting in injuries to the employees of the State who are under the Act, pursuant to the terms of the Compensation Act. We must, therefore, consider Section 24 of the Compensation Act.

It is argued by counsel for claimant that the five year Statute of Limitations under the Court of Claims Act should apply, and not the provisions of Section 24 of the Compensation Act, and it is argued that the law does not favor repeals by implication, and that the Legislature did not contemplate that the provisions of the Compensation Act would take precedence over the five year statute mentioned in the Court of Claims Act.

The Supreme Court of Illinois and this court has many, many times held that no jurisdiction can attach to a case where the claim was not filed within a year. The only jurisdiction this court has in compensation cases is statutory and the statute specifically provides that the court must hear and determine the liability of this State for accidental injuries or death suffered in the course of employment by any employee of the State, such determination to be made in accordance with the rules prescribed in the Act commonly called the "Workmen's Compensation Act."

Clearly, we have no jurisdiction of a case when the provisions of Section 24 have not been fully complied with. Because claim was not filed within a year, the motion of the Attorney General must be sustained and the cause dismissed.

(No. 2146—Claim denied.)

MAX K. MEYER, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 12, 1937.

H. L. FEIGENHOLTZ, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

MORTGAGE—deed of dedication of part of property covered by when security of not affected by—when claim by owner of note secured by for value of property dedicated and for damages to that not taken must be denied
Where a portion of land covered by a mortgage is conveyed to State by deed of dedication for public use, but consideration therefore is not paid to owner of note secured by mortgage, no award can be made to such owner for value of property dedicated, or damages to that not taken, where it clearly appears that value of said property not taken is ample security for mortgage debt, and that security of mortgage is not destroyed or impaired.

Mr. Justice LANSFORD delivered the opinion of the court:

The contention of the claimant, Max K. Meyer, of the Village of Winnetka, County of Cook and State of Illinois, in this case is that on the 8th day of December, 1927, Frank J. Bruno and Helen Bruno, his wife, gave their certain promissory note or notes to him, due five years after date with interest at six per cent. per annum, in the sum of \$4,500.00, and to secure the same, gave a trust deed to Max K. Meyer, on premises described in the complaint.

It is further alleged that in the year 1930, the State of Illinois, wrongfully and unlawfully appropriated and took for the construction of the State road known as Skokie Highway, a part of the premises covered by the trust deed and described in the complaint, and it is alleged that the State of Illinois never paid the claimant the value of the land so taken, and claimant makes claim against the State for the sum of \$1,000.00, being the value of the land so taken.

A considerable time after this claim was filed, an amendment thereto was filed by claimant, and the adammum was increased from the sum of \$1,000.00 to the sum of \$2,500.00, the extra \$1,500.00 alleged as damages is for damages for land not taken by the State.

A stipulation was filed to the effect that on the 8th day of December, 1927, Bruno and his wife, executed a trust deed to Max K. Meyer, as trustee, conveying the property in-

involved, and that deed was duly recorded on December 21, 1927 in the Recorder's Office of Cook County, and that thereafter, on March 20, 1929, Bruno and his wife, executed a second trust deed to Max K. Meyer to secure a note for the sum of \$1,200.00; that said second trust deed was duly recorded on March 22, 1929, and thereafter, on April 21, 1930, Bruno and his wife, conveyed by warranty deed, the property involved to Helen Lala, which deed was duly recorded. It is further stipulated between the parties that a Dedication Plat for Public Highway Route No. 57 was made by Bruno and his wife, the actual date not appearing upon the dedication plat, but which was acknowledged on August 7, 1930, and recorded on July 8, 1932. It is also stipulated that a Certificate of Sale was issued by the Master in Chancery, Julius H. Miner, dated December 29, 1932, and recorded in the Recorder's Office of Cook County on January 5, 1933. It, therefore, appears as a matter of record, that the trust deed dated on the 8th day of December, 1927, was a prior lien.

The record does not directly disclose the purport of the Master's Certificate dated December 29, 1932, but we assume from other statements in the record that this Certificate of Sale is the result of the foreclosure of a second trust deed dated March 20, 1929. The warranty deed from Bruno and his wife, dated April 21, 1930, and running to Helen Lala can have no effect upon the rights of Max K. Meyer, the claimant. The effect of the dedication plat might, however, be different. The record does not disclose who the actual owners of the notes secured by the trust deed are, but from the declaration it is averred that in the year of 1930, Meyer, the claimant, was the legal holder and owner of the trust deed and notes dated the 8th day of December, 1927.

A hearing was had and two real estate men, both equally familiar with the valuation of land in the vicinity of the premises wherein the land in question was located, testified. It appears that approximately one-fourth of the land was taken for highway purposes. The record does not disclose whether a Master's Deed was ever issued upon the Master's Certificate above referred to. Neither does the record disclose who had the possession of the premises dedicated for highway purposes, at the time of such dedication. While we might safely assume that a sale was had under the second trust deed, the record does not disclose who the purchaser at

the sale was, nor the amount of the purchase price. These questions, and other similar questions that might be raised under the view that we take of this case, are unimportant. It is likewise unnecessary for us to consider "damages" to the land "not taken." The witness, Louis T. Dodds, who testified for the claimant, apparently was a man who had had much experience as a real estate broker in this particular vicinity. An examination of his testimony discloses that he was a man of good judgment on such matters, and his testimony is, therefore, quite convincing. According to his testimony, the property in question at a time immediately after the dedication, was worth the sum of \$9,000.00. What is said of Mr. Dodds can be said with equal force of the witness for the State, Mr. J. Frederick Kinney, who placed the valuation of the premises in question at \$6,320.16. Insofar as this record is concerned, it is immaterial which witness is right & which witness is more nearly right, because the value fixed by both witnesses is sufficient to cover the principal amount of the note secured by the first trust deed, less a depreciation of valuation on the property not taken. The complaint does not claim any damages under the second trust deed. If this had been a condemnation proceeding, it would leave the claimant here with all of his rights set forth in the trust deed. It is very apparent that he has not suffered any damages by the dedication of the specific property mentioned in said trust deed. Where the loss of security is material, as it is always assumed to be whenever the entire mortgaged estate is condemned, the courts will grant the mortgagee some remedy. In some states, the legal title to land, subject to a mortgage, is held to vest in the mortgagor and the mortgagee is regarded simply as a secured creditor. In such states, the latter party is not recognized as a party in the condemnation proceedings and the entire award is assigned to the mortgagor, but the mortgagee, in such jurisdictions, may have his award applied to the payment of his debt by a court of equity. 1 Nichols, Em. Dom. 353, 2 Lewis, Em. Dom. Secs. 523, 720. But in the majority of jurisdictions, particularly where the mortgagee is deemed to have title to the land, subject to defeasance and to the mortgagor's equity of redemption, the courts recognize the interest of the mortgagee in the condemnation proceedings themselves. Whenever the entire mortgaged property has been "taken," these courts have held

that the award payable to the condemnor stands in the place of the land, and that the various liens which attached to the land, now attach to the award. *Colehour vs. State Savings Inst.*, 90 Ill. 152.

The Supreme Court of Illinois in the case last cited also held that where mortgaged property is condemned and appropriated to public use, and the compensation awarded to the owner or mortgagor exceeds the sum due on the mortgage, and is not paid, it is not proper on bill to foreclose to order a sale of the premises. The sum found due should be ordered paid out of the condemnation money.

In the case before us, the security for the notes is not destroyed and may not be even substantially impaired. The record does not disclose that a receiver has been applied for. In such cases, a receiver could only be appointed by the court if there was scant security for the debt.

In *Federal Trust Co. vs. East Hartford Fire District*, 283 Fed. 95, and in *Knoll vs. New York, etc.*, R. Co. 121 Pa. 467, 472, 1 L. R. A. 366, a case decided in 1888, where the condemnor had paid compensation to the mortgagor for a "damaging," the court refused to allow the mortgagee to recover against the condemnor, because it appeared that the mortgage debt was "abundantly secure." So it appears in this case.

An award, therefore, will be denied, and the motion of the Attorney General, which motion we have construed as a demurrer to the evidence, will be sustained. This cause is, therefore, dismissed.

(No. 2919—Claimant awarded \$837.08.)

RUSSELL F. WRIGHT, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 13, 1937.

JOSEF T. SKINNER and ARTHUR H. ELLIS, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR and MURRAY F. MILNE, Assistant Attorneys General, for respondent.

WORKMEN'S COMPENSATION ACT—when award for compensation under may be made. Where it appears that employee of State sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra hazard employment, resulting in partial loss of use of leg, an award for compensation for same may be made, in accordance with provisions of Act, upon compliance with the terms thereof.

MR. JUSTICE VAN DUSEN delivered the opinion of the court:

Claimant, Russell F. Wright, entered the employ of the State of Illinois in February, 1933 and had been continuously employed thereafter until July 10, 1935. On the latter date he was working for the Division of Highways, as a helper in gravel repair work, on Illinois S. B. I. No. 92, in Bureau County. While loading a truck at a gravel pit the bank washed in, striking claimant on the right side and covering him waist deep. His companion extricated claimant from the gravel and he was taken to his home, and then, under the care of Dr. C. J. Flint, to the Hospital at Princeton. He was in the hospital from July 10th to July 15th, and thereafter at different times for X-rays. He performed no labor until June 15, 1936, since which time he has been employed under WPA at the gravel pit for a period of two weeks, four days in each week. Finding himself under strain at this work he was transferred and placed on a Project at the Bureau County Court House; where he had worked for six days up to the time of the taking of evidence on the 16th day of March, A. D. 1937.

Following his care at the Princeton Hospital, claimant was sent to the Methodist Hospital at Peoria, on January 9, 1936, where he received treatment under the care of Dr. Hugh E. Cooper. The latter testified that his first examination of claimant disclosed the following:

"A definite lateral instability in the right knee joint, with a forward and backward motion of the head of the Tibia on the Femur. There was a relaxation of the lateral ligaments of the knee joint and a stretching of the crucial ligaments which control the forward and backward motion of the Tibia on the Femur. A reconstruction of the lateral ligaments was performed. A long lateral incision was made along the outer side of the thigh and along fibrous structure which extends along the outer aspect of the thigh and attaches to the upper end of the Fibula just below the knee joint was cut loose at its upper end, a hole was drilled about a quarter inch in diameter laterally through the Femur, and the long strip of Fascia Lata about an inch and a half wide was drawn through the hole in the Femur and brought down on the inner side of the Femoral Condyle, and we having made another incision on the inner side of the knee joint and attached this Fascia into the Periosteum on the inner upper end of the Tibia, there giving a new ligament, enforcing both the inner and outer side of the knee joint. A cast was thereafter applied for a limited time."

Dr. Cooper, in testifying further as to claimant's present condition, stated:

"There remained little or no lateral instability in the knee, practically no forward and back movement of the Tibia on the Femur, with free mo-

tion in a straight line to about 90 degrees, as compared to complete flexion which would be about 145 degrees. Some atrophy of the muscles of the thigh is apparent."

and according to Dr. Cooper, there exists a permanent loss of functioning in the leg of approximately thirty (30) per cent. In expressing this opinion the witness took into consideration that in work not requiring heavy lifting the disability would prove very slight, but that for active manual labor requiring complete flexion and strength, the disability would be in excess of the average of thirty (30) per cent disability, suggested in his answer.

The evidence supports a finding of partial loss of use of claimant's right leg.

It is conceded that claimant and respondent were operating under the Illinois Workmen's Compensation Act; that the accident arose out of and in the course of claimant's employment, that the necessary notices were given, and claim filed within the period provided by statute. It further appears by stipulation that all doctor, hospital and medical bills incurred by claimant, in the total amount of Four Hundred Fifty-one and 68/100 (\$451.68) Dollars have been paid by respondent.

Claimant at the time of the injury was married and was the father of three children under sixteen years of age. He was receiving Forty (40) Cents per hour and working eight (8) hours per day. His actual earnings for the year previous covered one hundred ninety-seven (197) actual working days and amount to Six Hundred Ninety-five and 30/100 (\$695.30) Dollars, which indicates that he was employed at times for more than eight hours per day. As the actual annual earnings are here shown, the award is properly made on such basis, under the construction which we place upon *Section 10 (e)* of the Act. Fifty (50) per cent of claimant's average weekly wage of Thirteen and 37/100 (\$13.37) Dollars being less than Seven and 50/100 (\$7.50) Dollars, the minimum weekly compensation payment for temporary total incapacity, and as claimant at the time of his injury had three children under sixteen years of age, the basis of weekly pay is fixed at Thirteen (\$13.00) Dollars per week.

From the testimony of Dr. Flint claimant's temporary total disability ceased June 15, 1936, and the period of temporary total incapacity therefor is forty-eight (48) weeks

and five (5) days for which claimant would be entitled to the sum of Six Hundred Thirty-four and 80/100 (\$634.80) Dollars. He was actually paid Five Hundred Thirty-eight and 72/100 (\$538.72) Dollars, leaving a balance of Ninety-six and 08/100 (\$96.08) Dollars due him for temporary total disability. The amount due for thirty (30) per cent partial loss of use of his right leg is Seven Hundred Forty-one (\$741.00) Dollars, making a total award due the claimant of Eight Hundred Thirty-seven and 08/100 (\$837.08) Dollars, payable in sixty-four (64) weekly installments of Thirteen (\$13.00) Dollars each and one final installment of Five and 08/100 (\$5.08) Dollars. The last payment received by claimant was on May 20, 1936. As the total number of weeks compensation has heretofore accrued claimant is entitled to immediate payment of the entire sum of Eight Hundred Thirty-seven and 08/100 (\$837.08) Dollars, and an award is hereby made in favor of claimant for said amount.

This award being subject to the provisions of an Act entitled, "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," Approved July 3, 1937 (Sess. Laws 1937 p. 83) and being, by the terms of such act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from said appropriation from the Road Fund in the manner provided for in such Act.

(No. 3028--Claimant awarded \$1,450.00.)

BERTHA NOLAN AND PHYLLIS NOLAN, A MINOR BY BERTHA NOLAN,
HER MOTHER AND NEXT FRIEND, Claimants, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed October 13, 1937.

JOHN W. FRIBLEY, for claimants.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—when award for death may be made under. Where it is found that employee of State sustained accidental injuries, resulting in his death, arising out of and in the course of his employment, while engaged in an extra hazardous enterprise, an award for compensation for his death will be made to those entitled thereto, in accordance with the provisions of the Act, upon compliance with the terms thereof.

MR. JUSTICE LANSFORD delivered the opinion of the court:

From the stipulation of facts herein, it appears that for more than one year prior to the 10th day of November, A. D. 1936, one Edward A. Nolan was in the employ of the respondent as a highway maintenance patrolman in District No. 6; that on November 10th, 1936, about ten o'clock A. M., while in the course of his employment, said Edward A. Nolan was removing some broken pavement on S. B. I. Route 48 near Willey's Station in Christian County, preparatory to replacing it with new pavement; that at such time and place, while said Nolan was working with a pick on the pavement, a truck passed at a speed of about 25 miles per hour; that the corner of the truck either struck Nolan as it was passing, or struck the pick which he was using and threw it back against him, thereby causing injuries from which he died on the same day; that said Edward A. Nolan was removed to the hospital and an emergency operation performed; that apparently the driver of the truck did not know of the injury to Nolan, and the fellow employees of said Nolan were so excited over the accident, that they failed to obtain the license number of such truck, and the driver thereof has never been located, although the Sheriff and coroner of Christian County made diligent inquiry in that behalf.

Upon consideration of the record herein, the court finds:

1. That said Edward A. Nolan and respondent were, on the 10th day of November, A. D. 1936, operating under the provisions of the Workmen's Compensation Act.

2. That on said date said Edward A. Nolan sustained accidental injuries which arose out of and in the course of his employment, and which resulted in his death on the same day.

3. That notice of the accident was given to the respondent and claim for compensation made within the time required by the provisions of such Act.

4. That the earnings of said Edward A. Nolan during the year next preceding the injury were \$1,440.00, and his average weekly wage was \$27.70.

5. That the necessary first aid, medical, surgical and hospital services were provided by the respondent herein.

6. That said Edward A. Nolan left him surviving Bertha Nolan, his widow, and Phyllis Nolan, his daughter, both of

whom were totally dependent upon the earnings of said Edward A. Nolan for their support and maintenance; that said Phyllis Nolan was born June 27th, 1923, and therefore was 13 years of age at the time of the death of her father as afore said.

7. That under the provisions of Section 7-a and 7-b-3 of the Compensation Act, the amount of compensation to be paid by the respondent on account of the death of said Edward A. Nolan is Forty-four Hundred Fifty Dollars (\$4,450.00), payable in weekly installments of \$15.24 per week commencing on November 11th, 1936.

8. That the share of such compensation which otherwise would be payable to said Phyllis Nolan, should be paid to her mother, Bertha Nolan, for the support of said child.

9. That said Bertha Nolan is now entitled to have and receive from the respondent the sum of Seven Hundred Thirty-one Dollars and Fifty-two Cents (\$731.52), being the amount of compensation which has accrued from November 11th, 1936 to October 13th, 1937.

IT IS THEREFORE ORDERED that the share of such compensation which otherwise would be payable to said Phyllis Nolan shall be paid to her mother, Bertha Nolan, for the support of said Phyllis Nolan.

IT IS FURTHER ORDERED that an award be entered herein in favor of the claimant Bertha Nolan for the sum of \$4,450.00, payable as follows: the sum of \$731.52 being the amount of compensation which has accrued from November 11th, 1936 to October 13th, 1937, shall be paid forthwith. The balance of said compensation, to-wit, the sum of Thirty-seven Hundred Eighteen Dollars and Forty-eight Cents (\$3,718.48), shall be paid in weekly installments of Fifteen Dollars and Twenty-four Cents (\$15.24) commencing October 20th, 1937.

This award being made under the terms of the Workmen's Compensation Act for the death of a State employee, is subject to the provisions of an Act entitled "An Act Making an Appropriation to Pay Claims Arising Out of Injuries to State Employees, and Providing for the Method of Payment Thereof," approved July 3d, 1937 (Session Laws of 1937, p. 83).

In accordance with the provisions of such Act, this award is subject to the approval of the Governor, and upon such approval, is payable from the appropriation from the Road Fund in the manner provided in such Act.

(No. 2565- Claimant awarded \$861.75.)

CARL JOHNSON, Claimant, vs. STATE OF ILLINOIS. Respondent.

Opinion filed January 12, 1937.

Rehearing denied October 13, 1937.

CARPENTER, NELTOR & SCOLNIK, for claimant; CHARLES E. CARPENTER and ROY A. PTACIN, of counsel.

OTTO KERNER, Attorney General; JOHN KASSERMAN and GLENN A. TREVOR, Assistant Attorneys General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award for compensation may be made under.* Where employee sustains accidental injuries arising out of and in the course of his employment, while engaged in extra hazardous employment, an award may be made for compensation, upon notice given, claim made and application filed for same within time provided in Act.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim was filed January 7, 1935 for Ten Thousand (\$10,000.00) Dollars. The complaint alleges that the claimant, Carl Johnson, is a resident of Marengo, McHenry County, Illinois; that on December 17, 1933, he was employed by the respondent, State of Illinois, in the Division of Highways in McHenry County and his services consisted of the maintenance of surfaced highways, state routes 23 and 67 for which he received One Hundred (\$100.00) Dollars per month. That on December 17, 1933 while claimant was proceeding in a truck supplied by the respondent from Capron to Marengo in said County in the performance of his duty as State Highway Patrolman and while exercising all due care for his own safety, a passenger automobile came directly towards the truck driven by claimant. That claimant, to avoid a collision with said automobile, and to prevent injury to himself and others, drove said truck off the highway and into a culvert; that claimant, Carl Johnson, was violently thrown to the ground, greatly hurt and as a result permanently injured. That among other injuries claimant suffered a fracture of one vertebra in the spinal column in the region of the neck, several ribs were torn loose from the spinal column, and he is permanently disabled and unable to work at his usual occupation and has lost profits and wages he could have earned if not injured as aforesaid.

That as a result of said injuries claimant was unable to perform his usual tasks in the employment in said Division of Highways and was confined to the hospital and his home from December 17, 1933 to April 4, 1934; that during said period he received his monthly salary for January, February and one-half of March, 1934. Claimant returned to work in said Division of Highways on April 4, 1934.

As a result of said injuries claimant was confined to hospitals and put under physicians' care, and incurred medical and hospital bills for the same to the amount of Four Hundred Ninety-eight (\$498.00) Dollars which have been paid by respondent.

Respondent raises the issue as to whether claim was made within six months after the accident occurred, and as to whether application for an award was filed within one year after such accident, as required by *Section 21* of the *Workmen's Compensation Act*. Whether we treat the payments made to plaintiff by respondent in December, 1934 and in January, February and March, 1935 as wages or compensation, is immaterial under recent decisions of the Supreme Court of this State. Such payments tolled the running of the statute. This court finds that the claim and application were made within apt time, and that the court has jurisdiction of the parties and the subject matter.

The third issue raised by respondent is "Upon what basis can an award be made?"

Claimant by counsel, contends that there is a "disfigurement," "a permanent deformity" of his neck, compensable under *Section 8 (c)* of the *Workmen's Compensation Act*. Compensation for such disfigurement, if any, was not provided for under the said Act as it read in 1933, when the accident occurred. Determination of relief is restricted to the statute as it then existed.

Claimant further contends for an allowance for permanent, partial loss of use of his right arm, under *Schedule 8 (c)* of the Act, and for permanent partial loss of hearing of one ear. A general contention is also made for partial, permanent disability. The testimony as to any loss of hearing is negligible, claimant testifying (Abst. p. 9) in answer to the question, "Any injury to your hearing?" "A little." The evidence as to his general disability is not sufficient to support an award therefor. He was injured December 17, 1933.

He returned to work April 4, 1934, and was paid the same wages and performed the same duties as before his accident. In July, partly due to a change in method of pay and partly to a change of his status as foreman, he was put on an hourly pay basis instead of a flat rate of One Hundred (\$100.00) Dollars per month, and thereafter received Eighty-five and 95/100 (\$85.95) Dollars for July—Ninety-seven and 40/100 (\$97.40) Dollars for August—Eighty-six (\$86.00) Dollars for September—Ninety-five (\$95.00) Dollars for October and Eighty-one (\$81.00) Dollars for November, 1934. In answer to the question of what character of work he has done since becoming a helper on Highway maintenance work (Transcript p. 19) he testified, "General work: Whatever there was to do. Although I have been favored some, I can practically do any of it." The part that he apparently cannot do is seemingly due to the disability in his right shoulder and arm. The evidence shows (Transcript p. 11) that when working with a horse he cannot put the harness on it because he cannot get his arm up high enough. A fellow-employee, William A. Giblin, testified that, "Plaintiff cannot raise his right arm as high as his shoulder and he can't lift or carry any heavy weight." The medical testimony by Dr. E. J. Berkheiser, an orthopedic surgeon of Chicago, who first examined plaintiff on February 10, 1934, supports the above evidence; the Doctor testifying that there is considerable limitation of motion in plaintiff's right shoulder, due probably to adhesions and thickening of the soft structure about the shoulder joint.

It is difficult, under the evidence, to determine the per cent of disability, or loss of use of plaintiff's right arm, suffered by him. From a careful consideration of the entire record the court is of the opinion that the record supports an award of 33 1/3% loss of use of such member. *Section 8 (d-13)* provides, "For the loss of an arm, or the permanent and complete loss of its use, 50% of the average weekly wage during 225 weeks."

Under *Section 8 (d-17)* an allowance is made "For the permanent, partial loss of use, etc. 50% of the average weekly wage during the portion of the number of weeks in the foregoing *Schedule * * ** which the partial loss of use of the member bears to the total loss of use thereof."

Plaintiff's average weekly wage was Twenty-three and 07/100 (\$23.07) Dollars. Fifty (50) per cent thereof (\$11.53)

for one-third (1/3) of 225 weeks is Eight Hundred Sixty-four and 75/100 (\$864.75) Dollars.

An award is hereby entered in favor of claimant in said sum of Eight Hundred Sixty-four and 75/100 (\$864.75) Dollars for said specific loss. Such award would be payable in monthly payments of Eleven and 53/100 (\$11.53) Dollars per week. As the full amount of said award has matured prior to this date, payment of the full amount at this time is approved.

This award being subject to the provisions of an Act entitled, "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," approved July 2, 1935 (Sess. Laws 1935, p. 49) and being, by the terms of such act, subject to the approval of the Governor is hereby, if and when, such approval is given, made payable from the Appropriation from the Road Fund in the manner provided for in such Act.

(No. 2518—Claim denied.)

HARRY Y. ARMSTRONG, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 13, 1937.

GEORGE E. DRACH, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

HIGHWAYS—*construction and maintenance of, governmental function.* The State exercises a governmental function in the construction and maintenance of public highways, and is not liable for damages caused by either a defect in the construction or failure to maintain same in a safe condition.

NEGLIGENCE—*employee of State Division of Highways—State not liable for—doctrine of respondent superior not applicable to State.* The State in the exercise of a governmental function is never liable for the negligence of its officers, agents or servants, the doctrine of respondent superior not being applicable to it.

MR. JUSTICE LINSOTT delivered the opinion of the court:

The complaint herein alleges that on the 15th day of April, A. D. 1934, claimant was driving his automobile in a westerly direction on U. S. Route No. 36 to and towards the intersection thereof with a paved highway leading south therefrom to the Town of Loami, Illinois, and was in the exercise

of all due care and caution for his own safety; that one of the servants and agents of the respondent, to-wit, an employee of the Division of Highways was then and there driving a motor vehicle of the respondent a short distance ahead of the claimant and going in the same direction; that said employee of the respondent carelessly and negligently stopped the vehicle which he was driving, at or near the aforementioned intersection abruptly and without warning to the claimant; that the claimant was unable to stop his automobile in time to avoid a collision, and his automobile collided with the motor vehicle of the respondent and was damaged to the extent of \$50.00, for which amount he seeks an award in this proceeding.

The Attorney General has moved to dismiss the case for the reason that the respondent is not liable for the negligence of its servants and agents under the facts set forth in the complaint.

The report of the Division of Highways presents a state of facts entirely different from that set forth in the complaint herein, but for the purposes of this motion, the facts set forth in the complaint will be taken as true.

This court has repeatedly held that the State in the maintenance of its hard-surfaced roads is engaged in a governmental function, and that in the exercise of such functions, it is not liable for the negligence of its servants and agents, in the absence of a statute making it so liable. *Allerton vs. State*, 8 C. C. R. 218; *Schweizer vs. State*, 8 C. C. R. 432; *Wright vs. State*, No. 1981, decided at the September, 1935, Term; *George McCready vs. State*, No. 2604, decided at the September, 1935, Term; *Joe Boner, et al. vs. State*, No. 2529, decided at the September, 1935, Term.

There is no statute authorizing an award under the facts set forth in the complaint and we therefore have no jurisdiction to allow an award. *Crabtree vs. State*, 7 C. C. R. 207; *Titone vs. State*, No. 2473, decided at the January Term, 1937.

The motion of the Attorney General must therefore be sustained. Motion allowed. Case dismissed.

(No. 2513—Claim denied.)

EDWARD JOHNSON, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 13, 1937.

WILLIAM R. JORDAN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

ILLINOIS NATIONAL GUARD—*control and regulation of, governmental function.* It is well settled that in the control and regulation of the Illinois National Guard the State exercises a governmental function.

SAME—*negligence of officers or members of—State not liable for.* The State is not liable for the negligence of the officers or members of the Illinois National Guard.

MR. JUSTICE LANSFORD delivered the opinion of the court:

The complaint herein alleges in substance that claimant resides at the corner of Lincoln and Eighth Streets in Hinsdale, Illinois; that on the evening of April 6th, 1934, a member of the Army Air Corps lost control of the plane which he was piloting, and landed same on the premises occupied by the claimant, striking a certain plow and disc owned by the claimant and demolishing same, to the damage of the claimant of \$62.50, for which amount he seeks an award in this proceeding.

The Attorney General has entered a motion to dismiss for the reason that there is no liability on the part of the State under the facts set forth in the complaint.

The report of the Adjutant General indicates that the accident in question was not caused by any fault or neglect on the part of the pilot, but for the purposes of this motion, the facts set forth in the complaint will be taken as true.

The complaint does not allege that the pilot of the plane was an agent or servant of the respondent, nor does it allege that the damage in question resulted from any negligence on the part of said pilot. However, even if the proper allegations in that behalf were set forth in the complaint, we would have no authority to allow an award.

The State in the control and regulation of the Illinois National Guard, is acting in a governmental capacity, and this court has repeatedly held that in the exercise of its governmental functions, the State is not liable for the negligence of its servants and agents, in the absence of a statute making it so liable. *Hays, et al. vs. State*, 5 C. C. R. 359; *Kershaw vs. State*, 6 C. C. R. 587; *Winnebago County, etc. vs. State*, 7 C. C. R. 95. No such statute has been called to our attention, and in the absence thereof, we have no authority to allow an award. The motion of the Attorney General must therefore be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 2497--Claim denied.)

WILLIAM NELSON, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 13, 1937.

E. H. WEGENER, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PENAL INSTITUTION—conduct of governmental function. In the conduct of State penal institutions the State exercises a governmental function.

SAME—negligence of employees or inmates of—State not liable for. The State in the exercise of a governmental function is not liable for the negligence of the officers, servants, agents or inmates of penal institutions.

MR. JUSTICE LANSFORD delivered the opinion of the court:

The complaint herein alleges in substance that prior to and on the 31st day of August, A. D. 1934, the claimant resided on a farm known as the Henry Bode farm in Randolph County, Illinois, which adjoins the premises of the Southern Illinois Penitentiary; that on said date a number of convicts from such Penitentiary in charge of a guard, were burning grass and rubbish on the respondent's property, and thereafter returned to the prison without having put out the fire; that said fire afterwards spread and was communicated to a shed on the land occupied by the claimant, in which certain tools were kept, whereby said shed, tools and implements were destroyed, and the claimant seeks an award for the value thereof.

The Attorney General has moved to dismiss the case for the reason that the respondent is not liable under the facts set forth in the complaint.

The report of the Farm Superintendent of the respondent sets up a state of facts which are entirely at variance with the facts set forth in the complaint, but for the purposes of the aforementioned motion, the facts set forth in the complaint will be taken as true.

We have repeatedly held that the State in the conduct and maintenance of its penal institutions is engaged in a governmental function, and that in the exercise of such functions, it is not liable for the negligence of its servants and agents in the absence of a statute making it so liable.

The question here involved was presented to this court in the case of *Rocco Titone, et al. vs. State*, No. 2473, decided

at the January Term, 1937, of this court. In that case, after a careful and exhaustive consideration of the authorities, we held that the State was not liable for damages caused by a fire which spread as the result of the negligence of the servants and agents of the respondent in the employ of its Highway Department.

Under the decision in the Titone case we have no authority to allow an award.

Motion of the Attorney General must therefore be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 2423--Claim denied.)

GEORGE STONE, A MINOR, BY LULA MARSHALL, MOTHER AND NEXT FRIEND, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 1, 1937.

Rehearing denied October 13, 1937.

T. A. GASAWAY AND G. C. BORDERS, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURIES—*sustained as result of negligence of State employees --State not liable for—doctrine of respondent superior not applicable to State—equity and good conscience, when award on grounds of cannot be made. The facts in this case are similar to those in Garbutt Admr. vs. State, No. 2246, supra and what was said in that case applies with equal force herein.*

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The complaint in this case alleges that George Stone, a minor, was riding in a car on a State Highway known as Route No. 11, which tunneled under the Baltimore and Ohio and Pennsylvania Railroad Tracks, on the Northern City Limits of East St. Louis, Illinois, and that there was constructed along that portion of the Highway usually used, a side walk for the use of foot travelers and pedestrians, and this side walk was protected by a certain iron railing through said tunnel; that said railing was constructed by iron posts and iron pipes spaced about two feet apart, the upper rail or pipe of which was fastened to the iron post by steel clamps; that it became, and was the duty of the Highway Department of the State of Illinois, to use due care and caution to keep

said railing in reasonable repair and safe condition for the use of people lawfully using the Highway; that the Highway department disregarded its duty in this behalf and carelessly and negligently permitted the top iron rail or pipe to become in a bad and unsafe condition and repair; that where the same passes through the tunnel, one end was broken loose from its iron support and the south end of the said top iron pipe bent and protruded into the path where motor vehicles were being driven, and that about the hour of 9:00 P. M. on the 3rd day of July, 1933, the claimant while riding in an automobile traveling in a northerly direction, and while in the exercise of due care and caution for his own safety, struck the said railing with his right arm; that the arm was fractured and remained stiff; that he was put to the expense of \$500.00 for doctors' bills and hospital bills, and asks the sum of \$10,000.00 damages.

The boy was 18 years of age at the time of the accident. The proof substantiated the charges made in the declaration.

The Attorney General has made a motion to dismiss the case for the reason that damages are sought for an injury sustained because of the alleged negligence of the Highway Department, and urges that the case be dismissed for the reason that in the construction and maintenance of roads the State acts in its governmental capacity,—it is exercising its sovereign powers—and it does not permit these powers to be questioned by any tribunal. It can only act through its officers and employees, and if these officers perform their duties in a negligent manner, the negligence is the negligence of the officers and not of the State. These well known principles of law are so thoroughly established that citation of authorities seems unnecessary. In the case of *Kinnare vs. City of Chicago*, 171 Ill. 332, the rule is announced in the following language at page 335: "The State acts in its sovereign capacity, and does not submit its action to the judgment of courts and is not liable for the torts or negligence of its agents, and a corporation created by the State as a mere agency for the more efficient exercise of governmental functions is likewise exempted from the obligation to respond in damages, as master, for negligent acts of its servants to the same extent as is the State itself, unless such liability is expressly proved by the statute created such agency." See

also *Cooney vs. Town of Hartland*, 95 Ill. 616; *Jorgensen vs. State*, 2 Cl. Cl. 14; and many other authorities are cited.

Claimant contends that the motion of the Attorney General should be dismissed for the reason that Paragraph 4 of the Court of Claims Act provides that: "The Court of Claims shall have power to hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, ex contractu and ex delicto, which the State, as a sovereign commonwealth, should, in equity and good conscience, discharge and pay." This provision of the statute has been before this court in the case of *Crabtree vs. State of Illinois*, 7 Court of Claims Reports, page 207, where we said: "The provisions of Paragraph 4 of Section 6 of Court of Claims Act with reference to equity and good conscience merely defines the jurisdiction of the court and does not create a new liability against the State nor increase or enlarge any existing liability and limits jurisdiction of court to claims under which State would be liable in law or equity, if it were suable, and where claimant fails to bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure one."

The motion of the Attorney General to dismiss this case will, therefore, be sustained.

Case dismissed.

(No. 2355—Claim denied.)

EDWARD SHILKITS, A MINOR, BY STELLA SHILKITS, HIS MOTHER AND NEXT FRIEND, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 10, 1937.
Rehearing denied October 13, 1937.

JOHN T. ZURIS, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

NEGLECT—employees of State Penal Institution—State not liable for. In the conduct of State penal institutions the State exercises a governmental function and is not liable to respond in damages for personal injuries sustained by inmate thereof as the result of the negligence of its officers, servants or agents employed therein or in charge thereof.

PERSONAL INJURY—inmate of St. Charles School for Boys—State not liable for. Where inmate of St. Charles School for Boys sustained injuries, resulting in the loss of an arm, alleged to have been caused by the negligence

of the employees of said school in ordering inmate to operate a defective machine without giving him adequate prior instructions as to the operation thereof, an award for damages must be denied as the doctrine of respondeat superior is not applicable to the State in the exercise of a governmental function.

MR. JUSTICE YANTIS delivered the opinion of the court:

Edward A. Shilkitis, at the age of thirteen years, was on January 10, 1931 committed to the St. Charles School for Boys. At that time he was in good physical health. His only assignment at the Institution up to October 27, 1932 was as a Saxophone and Clarinet player in the band. On the latter date one Bruce Meyer, an employee of the institution and in charge of the laundry, called Edward into the laundry and requested him to operate the mangle. He had received no previous instruction as to the handling of such machinery, and while operating it his clothing caught in the machine and his right hand was pulled into the mangle up to his elbow; that when he screamed for assistance, attendants attempted to extricate his arm, but because of the defective condition of the machine and the negligence of employees, his arm instead of being pulled out was drawn further into the mangle up to a point near the shoulder; that his arm was so crushed and torn it became necessary to amputate same at a point four inches below the shoulder, thereby ending his musical career, for which he had shown real promise, and handicapping him for all future time in earning a livelihood.

His claim for an award of Ten Thousand (\$10,000.00) Dollars was filed herein by Stella Shilkitis as his mother and next friend.

The Attorney General has filed his motion to dismiss said claim for the reason that on its face it is an attempt to collect for injuries suffered by one while an inmate of one of the State's charitable institutions, and further that such recovery is predicated upon the negligence of the State and its employees in placing Edward Shilkitis at the work in which he was injured, without his having received adequate prior instruction therefor.

Claims against the State by those who have been committed to its charitable or penal institutions have arisen before. One claim was based upon alleged ill health of the inmate, occasioned by the fact that the food in such institu-

tion was steam-cooked which he was not accustomed to and his stomach would not properly digest steam-cooked foods.

Another has complained of the unduly severe character of labor to which he was assigned.

In these and all other cases of a similar character, this court, as at present constituted, has felt compelled to deny any award. These matters were considered in the cases of *Lillie Bell Jones vs. State*, 8 C. C. R. 78 and *Butler vs. State*, 8 C. C. R. 103. In the former case this statement appears, "Strictly public institutions created, owned and controlled by the State or its subdivision such as State asylums, city hospitals, reformatories, etc., are not liable for the negligence of their agents. The doctrine of 'Respondent Superior' does not apply."

The serious and permanent injury suffered by this boy appeals most strongly to the sympathies of the court, and an opinion herein has long been delayed in the hope that some legislative action might be taken whereby the Court of Claims could in its discretion allow an award in cases where gross negligence upon the part of some employee of the State appears in the record, without any contributory negligence upon the part of the claimant. Even then however, the propriety of awards being granted to inmates of penal institutions would remain a question of grave doubt.

Under existing law and policies the court is compelled to dismiss the claim. Motion granted and claim dismissed.

(No. 2877—Claimant awarded \$1,393.70.)

JULIAN R. LITTLE, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 13, 1937.

CHARLES E. KELLER, for claimant.

OTTO KERNER, Attorney General; SVEINBJORN JOHNSON and GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*injury to employee of Board of Trustees of University of Illinois—when award, without establishing precedent may be made for under.* Where it appears that person employed by the Board of Trustees of the University of Illinois, sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra-haz-

ardous employment, an award for compensation, without establishing any precedent, in accordance with the provisions of the Act, may be made, payable out of funds, as may be provided therefor by law.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant, Julian R. Little, seeks an award for loss of wages, expense for hospital and medical attention and partial loss of vision, resulting from injuries sustained by him on July 26, 1935 while employed by the Board of Trustees of the University of Illinois, in the Department of Chemistry at the University. At the time of the accident claimant was preparing one of the chemicals which is sold by the Department in which he was working to the University and other institutions. He had been engaged in this employment since June 17th, 1935. Prior to that time he had been employed by the University as an Assistant Instructor on half time service, for which he received Six Hundred (\$600.00) Dollars over a nine month period and in addition thereto, was exempted from fees at the University of approximately One Hundred (\$100.00) Dollars per year. His wages at the time of the accident were Forty (40) Cents per hour, for a ten hour day, six days per week. The Division of Organic Chemical Manufacturers of the University employ many persons during the summer months to manufacture chemicals. All are employed on a short time basis and neither the claimant nor any other employee had been engaged in the employment of the University in the same class and employment for the full year immediately preceding the accident.

The injuries in question occurred as the result of a flask collapsing. The material on which Mr. Little was working was in a fairly large flask under slightly reduced pressure. As he was trying to remove a volatile material from it the walls of the flask suddenly gave way and the liquid was thrown in all directions. Claimant had just taken off his glasses to wash his face and the liquid not only sprayed upon his skin resulting in slight burns but was thrown into his eyes causing the injuries now complained of. He received immediate first-aid, then went to the Carle Hospital and received care from Dr. G. L. Porter who testified that from the time he first treated the patient on July 26, 1935 the destruction of corneal epithelium progressed daily in each eye until August 2nd, at which time the lower two-thirds of the right

cornea and the lower half of the left cornea were involved. Dr. Porter accompanied his patient to the Mayo Clinic, at Rochester, where further treatment was given. He took his patient in his, Dr. Porter's car, for which no charge was made. They were accompanied by claimant's wife, who attended to the changing of bandages on patient's eyes and bathing them during the course of the trip, thereby saving the expense of a nurse, who would otherwise have been required, according to Dr. Porter. Prior to the accident claimant had worn glasses for many years. He was examined before the Health Officer, Dr. J. H. Beard of the University, on September 15th, 1934, and his record at that time shows that his vision without glasses was 20/40 in the right eye; 20/25 in the left eye; normal with correction in both eyes. He again examined the patient the day before his testimony on April 20th, 1936.

Dr. Beard testified that pursuant to the rules laid down by the Ophthalmological section of the American Medical Association, he arrived at the visual efficiency of claimant's right eye of sixty-five (65) per cent loss, and for the left eye at a loss of thirty-seven and seven tenths (37.7) per cent, giving a total permanent disability of forty-four and five tenths (44.5) per cent of visual efficiency. Dr. Porter testified that the percentage loss of visual efficiency is fifty-one (51) per cent in the right eye for distance and seventy-three (73) per cent for near vision; and for the left eye, thirty (30) per cent for distance and thirty-six (36) per cent for near vision, and that the average loss is sixty-two (62) per cent in the right eye and thirty-three (33) per cent in the left eye. That this loss percentage in the loss of vision is the loss existing with use of glasses, and that without glasses his vision would be poorer. A prior examination at the University Health Service Office, September 15th, 1934, revealed a vision of 20/20 in each eye with correction. Without correction, the vision in the right eye was 20/40, and in the left eye 20/25. The visual acuity with correction was normal at that time. It further appears from the testimony of Dr. Porter that a portion of the cornea in each eye is opaque as a result of the accident and that such condition is permanent, and that this condition is responsible for the loss of visual acuity.

Dr. Hallard Beard, Associate Professor and Acting Head of the Department of Ophthalmology of the University of

Illinois College of Medicine, testified that he examined claimant, on December 9th, 1936; that without glasses his visual acuity in the right eye was 20/200 and in the left eye was 20/65 minus 1. That with his glasses the visual acuity of the right eye was 20/40 minus 1, and of the left eye 20/25 minus 2. That patient has been wearing glasses ever since he was nine or ten years of age, and that the condition of the pupils was round, equal and active, with no sign of redness in either eye, and that such condition of the pupils and eyes is a normal condition; further, that the optic nerves of both eyes and the ocular tension or pressure were quite normal. Dr. Beard further testified that there was a large opacity over the lower two-thirds of the cornea of the right eye extending through all layers of the cornea. On the cornea of the left eye is a roughly circular, irregular superficial opacity of low density in front of the lower part of the pupil; also a dot one-fourth millimeter wide on the right lens in the center of the pupil, and one three times as large on the left lens. From his examination he states that the loss of visual efficiency of Mr. Little's right eye is approximately seventy-five per cent (75%) and of the left eye approximately fifty per cent (50%); that he will be continually annoyed by any strong light, and when subjected to average conditions of laboratory and office the handicap of vision will be greater than the bare estimate of the loss of visual efficiency so testified to by him; further, that such condition is permanent, and that such loss of vision was caused by the contact of his eyes with the caustic or corrosive chemical that entered his eyes at the time of the accident in question.

Claimant's work is such that the injury to his eyes in near vision is apparently a more serious loss than that resulting in distant vision. Considering the testimony of the three Doctors we find that on the right eye the average loss in near vision work is fixed at seventy-one per cent (71%) and of the left eye at forty-one and two tenths per cent (41.2%).

Accepting the above figures as the basis upon which compensation for loss of vision should be determined, we are next to consider the basis of earnings upon which computation should be made. Claimant was not engaged in the same grade of employment for the same employer for the full year immediately prior to the accident, and neither had others been so employed in the same or neighboring employments of

the same kind. The work in question was carried on for short periods through the summer months, and as heretofore stated, claimant's wage was Forty (40) Cents per hour for a ten hour day. His employment would therefore come within the provisions of *Section 10 (c)* of the Workmen's Compensation Act of Illinois, under which the minimum number of days to be used as a basis for determining a year's work is fixed at a minimum of two hundred (200) days. Upon such basis claimant's annual earnings would figure Eight Hundred (\$800.00) Dollars, with an average weekly wage of Fifteen and 38/100 (\$15.38) Dollars.

The Workmen's Compensation Act contains the following provisions relative to the loss of sight:

"For the loss of the sight of an eye or for the permanent and complete loss of its use, fifty percentum of the average weekly wage during one hundred twenty weeks."

Sec. 8 (c) 16, Ill. Workmen's Compensation Act.

"For the permanent partial loss . . . of sight of an eye . . . fifty percentum of the average weekly wage during that proportion of the number of weeks in the foregoing schedule provided for the loss of sight of an eye which the partial loss of use thereof bears to the total loss of sight of an eye."

Sec. 8 (c) 17, Ill. Workmen's Compensation Act.

Under the facts here in evidence claimant would therefore be entitled to an award of Six Hundred Fifty-five and 18/100 (\$655.18) Dollars for the partial loss of use of his right eye, and Three Hundred Seventy-nine and 99/100 (\$379.99) Dollars for the partial loss of use of his left eye, or a total of One Thousand Thirty-five and 18/100 (\$1,035.18) Dollars. To this sum is to be added temporary total disability for a period of eight (8) weeks from July 6, 1935 to September 1, 1935 on the basis of fifty (50) per cent of his average weekly wage of Fifteen and 38/100 (\$15.38) Dollars, i. e. Seven and 69/100 (\$7.69) Dollars, or Sixty One and 52/100 (\$61.52) Dollars.

In addition thereto, it appears from the record and it is conceded by counsel for respondent that Doctor and Hospital bills owing to the following persons, and in the following amounts, should be allowed.

| | |
|--|----------|
| Carle Hospital Clinic, Urbana, Illinois..... | \$175.00 |
| Carle Memorial Hospital, Urbana, Illinois..... | 32.00 |
| Mayo Clinic, Rochester, Minnesota..... | 25.00 |
| Worral Hospital, Rochester, Minnesota..... | 16.25 |

Also that claimant has expended the sum of Forty Eight and 73/100 (\$48.73) Dollars for necessary care during his temporary total disability for which he is entitled to reimbursement as shown by the record herein.

An award is hereby made in favor of claimant for the sum of \$1,145.42 as compensation; also a further award in his favor for the use of the hereinafter named Clinics and Hospitals as follows, to-wit:

| | |
|--|----------|
| Carle Hospital Clinic, Urbana, Illinois..... | \$175.00 |
| Carle Memorial Hospital, Urbana, Illinois..... | 32.00 |
| Mayo Clinic, Rochester, Minnesota..... | 25.00 |
| Worrall Hospital, Rochester, Minnesota..... | 16.28 |

| | |
|-------------|----------|
| Total | \$248.28 |
|-------------|----------|

Of said award the amount due claimant for temporary total disability of \$61.52, and the amount due for moneys expended for necessary care during such temporary total disability, of \$48.73, and the several amounts due the various hospitals herein above enumerated amounting to \$248.28, are all payable from the appropriation made under Senate Bill No. 483 from the "University of Illinois Revolving Fund," (Senate Bill No. 483, Sess. Laws, 1937 p. 239, No. 8) in the usual manner of disbursements therefrom.

That portion of said award made for specific loss suffered by claimant, i. e.:

| | |
|---|----------|
| For 71 per cent partial loss of vision of right eye..... | \$655.18 |
| For 41.2 per cent partial loss of vision of left eye..... | 379.99 |

| | |
|-------------|-------------|
| Total | \$1,035.17, |
|-------------|-------------|

is payable in weekly installments of \$7.69 per week, dating from July 6, 1935. Compensation in the sum of \$915.11 accrued by the 16th day of October, 1937.

The compensation due for temporary total disability and money necessarily expended in special care during such temporary total disability, amounting together to \$110.25 (also the sum of \$248.28 due the several hospitals and clinics above enumerated) will presumably be paid instantan.

It is further ordered that the sum of \$804.86 (being a part of said total award) shall be paid to claimant as compensation earned to October 16, 1937, for which immediate payment is due; and that the further balance of \$230.32 shall be paid to claimant in future monthly warrants based upon

weekly payments of \$7.69 per week for twenty-nine (29) weeks; and one final payment of \$7.31.

This award of \$1,035.17 representing the lump payment of \$804.86, and the future weekly payments, being subject to the provisions of an Act entitled, "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," approved July 3, 1937 (Sess. Laws 1937, p. 83), and being, by the terms of such Act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from said appropriation from the General Fund in the manner provided for in such Act.

(No. 2309--Claim denied.)

FRANKIE JONES, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 13, 1937.

RAYMOND F. HAYES, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

NEGLIGENCE—*servants and agents of Chicago Park District--State not liable for.* The State is not liable for the acts or omissions of the servants or agents of the Chicago Park District, a Municipal Corporation, and a claim for damages for personal injuries sustained as a result of the negligence of such servants or agents must be denied.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The complaint herein alleges that on October 1st, A. D. 1933, while claimant was passing over and along a portion of Lincoln Park in Chicago, near Sheridan Road and Montrose Avenue, her foot and leg were caught or entangled by a wire which was extending from a certain tree to a stake, whereby she fell and received severe and permanent injuries, for which she seeks damages in the amount of \$5,000.00.

The complaint also alleges that said Lincoln Park is a State park and is possessed and controlled by the respondent; that at the time of the accident in question, claimant was in the exercise of all due care and caution for her own safety, and that her injury was the result of the carelessness and negligence on the part of the respondent in permitting said parkway to be obstructed by wires and other obstructions.

The Attorney General has entered a motion to dismiss on the ground that the State is not liable under the facts set forth in the complaint.

Our courts of last resort have held in a number of cases that park districts organized under the laws of the State, are municipal corporations, and that such park districts as well as other municipal corporations, in the maintenance of their public parks are exercising governmental functions, and in the exercise of such functions are not liable for the acts of their servants and agents, in the absence of a statute making them so liable. *Stein, Admr. vs. West Chicago Park District*, 247 Ill. App. 479; *Hendrix, Admr. vs. Urbana Park District*, 265 Ill. App. 102; *Love vs. Glencoe Park District*, 270 Ill. App. 117; *Gebhardt vs. Village of LaGrange Park*, 354 Ill. 234.

The same rule applies to the State and we have so held in numerous cases. *Bartle vs. State*, 7 C. C. R. 85; *Trombello vs. State*, 8 C. C. R. 56; *Metropolitan Trust Co., Admr. vs. State*, 8 C. C. R. 377; *Tony Monaco, Admr. vs. State*, No. 2057, decided at the September Term, 1935.

We have also repeatedly held that the jurisdiction of this court is limited to claims in respect of which the claimant would be entitled to redress against the State, either at law or in equity, if the State were suable. *Crabtree vs. State*, 7 C. C. R. 207; *Kramer vs. State*, 8 C. C. R. 31; *Shumway vs. State*, 8 C. C. R. 43.

We have no authority to allow an award under the facts set forth in the complaint, and the motion of the Attorney General to dismiss must be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 2279—Claim denied.)

HENRY W. AUSTIN, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 13, 1937.

Claimant, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

HIGHWAYS—maintenance of governmental function—negligence of employees of State in construction or maintenance of—State not liable for. In the construction and maintenance of a public highway the State is acting

in a governmental capacity and is not liable to respond in damages for injuries to persons or property, for the negligence of its officers, servants or agents in connection therewith.

MR. JUSTICE LANSFORD delivered the opinion of the court:

Claimant alleges in his complaint that on September 30th, 1933, about six o'clock P. M., he was driving his automobile in a northerly direction on S. B. I. Route No. 45, about one mile south of Frankfort, Illinois; that at that point certain repairs were then being made by the employees of the Division of Highways of the Respondent, who barricaded the highway by stretching a wire cable across the same; that said employees wholly failed and neglected to place a light or give other warning of the existence of such barricade to persons who were using the highway; that claimant was unable to see said barricade, and by reason of such fact, ran his automobile into the same, whereby it was materially damaged.

Claimant bases his claim upon the negligence of the servants and agents of the respondent in failing to give proper warning of the erection of the barricade in question.

The Attorney General has moved to dismiss the case on the ground that the State is not liable for the negligence of its servants and agents under the doctrine of respondeat superior in the absence of a statute making it so liable.

We have repeatedly held that in the maintenance of its hard-surfaced highways, the State is engaged in a governmental function, and that in the exercise of such functions, it is not liable for the negligence of its servants and agents in the absence of a statute making it so liable. *George McCready, et al. vs. State*, No. 2604, decided at the September Term, 1935; *Lester A. Royal vs. State*, No. 2597, decided at the September Term, 1935; *Peter Tivnan vs. State*, No. 3051, decided at the May Term, 1937; *Cecil W. York vs. State*, No. 2701, decided at the May Term, 1937.

There is no statute authorizing an award under the facts set forth in the complaint, and the motion of the Attorney General must therefore be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 1666--Claim denied.)

ALWART BROS. COAL COMPANY, Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed October 13, 1937.

MONAHAN & MONAHAN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN,
Assistant Attorney General, for respondent.

FRANCHISE TAX—*voluntarily paid cannot be recovered.* Taxes voluntarily paid cannot be recovered, in the absence of a statute authorizing such a recovery and in this State there is no such statute.

SAME—pleading—when demurrer to declaration will be sustained. Where declaration in claim for recovery of franchise tax, claimed to have been paid through error, fails to show amount of franchise tax assessed against claimant, or whether it paid any franchise tax, or that error was the result of mutual mistake of fact, or that tax was paid under protest, demurrer to same will be sustained.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This matter coming before the court on a demurrer to the declaration filed by the claimant on October 15th, 1930, and the declaration alleges that Alwart Bros. Coal Company of Delaware is the claimant and has a claim against the State of Illinois, for the sum of Ninety Dollars (\$90.00), arising out of the fact that through error this corporation was confused with the Alwart Bros. Coal Company, an Illinois Corporation, with an outstanding capital stock of Two Hundred Thousand Dollars (\$200,000.00), which later changed its name to Alwart Coal Company; the Delaware corporation having been authorized to do business in the State of Illinois with capital stock of One Thousand Dollars (\$1,000.00), the Delaware corporation having paid One Hundred Dollars (\$100.00) as a franchise tax when it should have paid Ten Dollars (\$10.00), which was done on July 15th, 1929.

It does not appear from the declaration the amount of franchise tax assessed against the Illinois corporation, Alwart Coal Company, or whether it paid any franchise tax. It is not averred that the error was the result of a mutual mistake, neither is it averred that the tax was paid under protest. Under the Illinois Statute, whenever money is paid to the Secretary of State for the State of Illinois, it is his duty to hold the same for thirty (30) days, when such funds are paid

under protest, and then such funds are to be paid over to the State Treasurer unless the party making such payment shall within such period file a bill in chancery and secure a temporary injunction restraining the making of such deposit; in which case such payment shall be held until the final order or decree of the court.

A tax voluntarily paid cannot be recovered back.

Western Electric Co. vs. State, 6 C. C. R. 414.

American Bridge Co. vs. State, 6 C. C. R. 485.

Commercial Solvents Corp. vs. State, 6 C. C. R. 442.

Conkling vs. City of Springfield, 132 Ill. 420.

Yates vs. Royal Ins. Co., 200 Ill. 202, 206.

Judge Dillon, in his work on Municipal Corporations, (3d ed. sec. 944) in discussing this question, makes the following statement:

"Money voluntarily paid to a corporation under a claim of right, without fraud or imposition, for an illegal tax, license or fine, cannot, there being no coercion, no ignorance or mistake of facts but only ignorance or mistake of the law, be recovered back from the corporation, either at law or in equity, even though such tax, license, fee or fine could not have been legally demanded and enforced."

We, therefore, sustain the demurrer and the claimant will have thirty (30) days from the filing hereof, to file an amendment to his declaration and if no amendment is filed within the said period of thirty (30) days, this claim will be dismissed for want of prosecution.

(No. 2179—Claim denied.)

JOHN MERKLE & SONS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 13, 1937.

CARL BEHRMAN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—negligence of State employee—State not liable for. The State is not liable for damages to property, alleged to have been caused by negligent operation of bridge, part of State highway, by employee of State, acting as bridge tender, as State is not liable for negligence of its officers, servants or agents, while acting in governmental capacity, the doctrine of respondeat superior not being applicable to the State.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant filed its complaint herein on May 25th, 1933, and alleges therein in substance that on August 20th, 1932 a certain Tudor Ford sedan belonging to the claimant was damaged as the result of the carelessness and negligence of one of the agents of the respondent in charge of the State Highway Bridge across the Illinois River at Pekin.

It appears that a portion of the bridge is lifted in order to provide for the passage of steamers thereunder, and that as the bridge is lifted, a steel gate is automatically lowered for the protection of persons driving over the bridge. In some way the steel gate was lowered on top of claimant's car, and it was thereby damaged. Claimant contends that the damage in question resulted from the carelessness and negligence of the bridge tender, and asks to be compensated for the damage so sustained.

The Attorney General has moved to dismiss the case on the ground that there is no liability on the part of the State under the facts set forth in the complaint.

The bridge in question is a part of the State highway and is owned and operated by the respondent.

This court has held in many cases that in the maintenance of its hard-surfaced highways, the State is acting in a governmental capacity, and while acting in that capacity, is not liable for the negligence of its servants and agents, in the absence of a statute making it so liable. *Beecher Williams vs. State*, 8 C. C. R. 578; *Sullivan vs. State*, 8 C. C. R. 140; *McDonald vs. State*, 8 C. C. R. 84. See also *Miner vs. State Board of Agriculture*, 259 Ill. 549.

We have no jurisdiction to allow any claim unless the claimant would be entitled to redress against the State either at law or in equity, if the State were suable. *Crabtree vs. State*, 7 C. C. R. 207; *Titone vs. State*, No. 2475, decided at the January term, 1937.

There being no liability on the part of the State under the facts set forth in the complaint, the motion of the Attorney General must be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 2147—Claim denied.)

MID-CITY STATIONERS, Claimant, vs. STATE OF ILLINOIS, Respondent.
Opinion filed October 13, 1937.

R. P. LICHTENWALNER, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—negligence of State employee. State not liable for.
The State is not liable for damages to property caused by the negligent and careless operation of one of its trucks by a State employee, the doctrine of respondeat superior not being applicable to the State.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Prior to and on the 11th day of March, 1933, claimant was engaged in business at 415 East State Street in the City of Rockford, where it was conducting a store for the sale at retail of stationery and office supplies.

The complaint herein alleges that on the last mentioned date, one of the highway maintenance patrolmen of the respondent in the performance of his duties was driving a certain State highway truck in an easterly direction on State Highway No. 5, and that said patrolman then and there drove and operated said truck in such a careless and negligent manner that it ran into and struck against the front of the building in which plaintiff was conducting its business as aforesaid, whereby the plate glass window and certain personal property there in display were damaged and destroyed;—for all of which claimant seeks to be compensated in this proceeding.

The Attorney General has moved to dismiss the case on the ground that the State is not liable for the negligence of its servants and agents.

We have repeatedly held that the State in the maintenance of its hard-surfaced roads is engaged in a governmental function, and that in the exercise of such functions, it is not liable for the negligence of its servants and agents, in the absence of a statute making it so liable. The liability, if any, rests upon the negligent employee and not upon the State. *Goldie Ryan vs. State*, 8 C. C. R. 361; *Audie Crank vs. State*, No. 2868, decided at the January Term, 1937; *W. C. Jenkins, et al. vs. State*, No. 2987, decided at the March Term.

1937; *George Franklin Garbutt, Admr., etc. vs. State*, No. 2246. Opinion on rehearing filed at the present term of this court.

We have no jurisdiction to allow any claim unless the claimant would be entitled to redress against the State either at law or in equity, if the State were suable. *Crabtree vs. State*, 7 C. C. R. 207; *Titone vs. State*, No. 2475, decided at the January Term, 1937.

There being no liability on the part of the State under the facts set forth in the complaint, the motion of the Attorney General must be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 2273—Claim denied.)

CHARLES BAKER, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed July 7, 1936.

Rehearing denied October 15, 1937.

FRANK R. EAGLETON, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*failure to make claim for compensation within time fixed in Act deprives court of jurisdiction to hear claim.* The facts in this case are similar to those in *Hopkins vs. State*, 9 Court of Claims Reports, 263, and what was said in the opinion in that case applies with equal force herein.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

On November 16, 1933, this claim was filed under the Workmen's Compensation Act, alleging that on or about September 26, 1929, the claimant was duly appointed to the highway maintenance police at a salary of One Hundred Seventy-five Dollars (\$175.00) per month, and from then on, performed all the duties of that employment up to June 18, 1932, when he was injured while riding his motorcycle near the City of Sumner, Illinois; that said injury occurred when one Oscar Baird started his car which was parked on the side of the road and made a left turn directly in front of the claimant, causing the claimant to strike the left side of said car head on; that as a result of the accident, the claimant received a badly wrenched back, a badly sprained right arm

and shoulder and sustained injuries to his right leg and right foot, and as a result, the claimant was unable to work at his employment from the date of the injury to July 2, 1932. It appears that the respondent has paid all the medical bills with the exception of a small amount for medicines which were required for home treatment after his being discharged by the doctor to return to work.

The claimant has no children under sixteen years of age but has a wife, who is dependent upon him.

It is now claimed that he has a permanent disability of twenty-five (25%) to his right leg.

As said above, the accident occurred on June 18, 1932, and the claim was filed herein on November 16, 1933.

Section 6 of the Court of Claims Act provides that this court must hear and determine the liability of the State for accidental injuries or death suffered in the course of employment by any employee of the State, such determination to be made in accordance with the rules prescribed in the Act commonly called the "Workmen's Compensation Act."

The Attorney General argues that under Section 24 of the Workmen's Compensation Act, claimant is now barred from presenting his claim, and this court has no jurisdiction of the case. In the case of *William Hopkins vs. State of Illinois*, No. 2097, we recently decided similar questions and what is said therein, applies with equal force to this case.

We must, therefore, dismiss this case for want of jurisdiction.

(No. 1991—Claim denied.)

CLAUDE ECHOLS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

Rehearing denied October 15, 1935.

HARRIS B. GAINES, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

NEGLIGENCE—Officers of Illinois National Guard—State not liable for. The State is not liable for damages for personal injuries sustained by member of Illinois National Guard, while in performance of his duties, as such member, as the result of the negligence of the officers thereof.

PERSONAL INJURY—member of Illinois National Guard—compensation for. The only provision for compensation for personal injuries to, or for death of members of Illinois National Guard suffered while in the performance of their duties as such are found in Sections 10 and 11 of Article XVI of Military and Naval Code.

SAME—same—when claim for compensation within provisions of Section 10 of Article XVI of Military and Naval Code. Where claimant, member of Illinois National Guard, while on encampment, was injured by falling off truck loaded with lumber, for use in erecting boxing ring, which was being driven to drill field, under orders of his superior officer, his claim for compensation for such injuries is governed by Section 10 of Article XVI of the Military and Naval Code, and he must show as a condition precedent that a Military Medical Board had determined that he was entitled to one-half pay for a period in excess of six months.

SAME—same—same—when Court of Claims has no jurisdiction to make award. Where claim of member of Illinois National Guard for compensation for personal injuries sustained while in the performance of his duties as such is within Section 10 of Article XVI of Military and Naval Code, claimant must show, before he invokes jurisdiction of court that Military Medical Board, provided in said Section 10, had determined that he was entitled to one half pay for a period in excess of six months, and where said Board has decided that claimant is not entitled to any such pay for a period of six months, court is without jurisdiction to hear claim.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claimant alleges in his claim filed on September 28, 1932, that he is a resident of the city of Chicago, and had been a member of Company B of the Eighth Illinois Regiment since 1931; that on the 1st day of August, 1931, by orders of the superior officers, he went to Camp Grant for encampment; that on the 2nd day of August, 1931, while in Camp Grant, he was ordered by a superior officer to assist in loading a truck with lumber to take out to the drill field for the purpose of building a boxing ring for the members of the regiment; that pursuant to the order, the claimant assisted in loading the truck with lumber, and climbed on top of the truck to take the lumber to the drill field and unload the same; that in their journey over to the place where they were to unload the lumber, the driver of the truck, who was also a member of claimant's regiment, drove into a hole about eight inches deep; that this caused the load of lumber to move, and the claimant lost his hold and fell from the top of the lumber on said truck to the ground, falling upon his back and right side; that as the result of the fall, one of his vertebrae was frac-

tured and another one was knocked out of place, and the claimant was otherwise injured and suffered great pain.

Claimant further alleges that he was examined by the regiment's physician and sent to the hospital at Rockford, Illinois, where he remained for three or four days; that while in said hospital he was put into a plaster cast, and was compelled to remain in the hospital until about the 15th day of August, 1931, at which time he was transferred to the hospital at Fort Sheridan, Illinois, where he was compelled to remain until the 28th day of October, 1931, and up to the time of the filing of the declaration, he was compelled to remain in his home. He also contends that he was at the time of the filing of the declaration, suffering great pain and was a charge upon charity, and was then unable to work and earn a living. He claims a permanent injury and states that he feels that he will never be well again and consequently he will not be able to do any laborious labor. Claimant also alleges that he is a married man and the head of a family, consisting of his wife and two children, who at the time of the injury, were 13 and 12 years respectively.

It is also averred that the injury was caused solely because of the failure of his superior officers to see to it that the large hole was filled in, and because of the insistence of the officers of the regiment that the lumber be moved on a rainy day, which lumber was wet and slippery, which made it difficult for the claimant to sustain his position while riding on the lumber. He also charges that it was the duty of his superior officers to see that he worked under safe conditions and that the roads were in good repair and free from holes and bumps, and charges that he was in the exercise of due care and caution for his own safety.

A motion was made by the Attorney General to dismiss this case on the ground that claimant seeks to recover for injuries alleged to have been received while on duty as a member of the Illinois National Guard and the Military Code makes provision for compensation for the injuries complained of without resort to the Court of Claims, and because thereof this court has no jurisdiction of the case.

It appears from the evidence that on October 4, 1932, General C. E. Black, the Adjutant General, filed a statement to the effect that claimant was on duty at field instruction of the Illinois National Guard as a member of Company "B"

8th Infantry, from August 1 to 15, inclusive, 1931; that on August 2, he was on fatigue duty, transporting a boxing ring from the warehouse to the regimental area by means of a truck; that shortly after leaving the main road, enroute to the boxing ring, the truck struck a depression, and the claimant fell out of the truck and struck the ground. The diagnosis made at the time was "Fracture of eleventh and twelfth thoracic vertebrae"; that the injury complained of was not due to the soldier's misconduct; that after the accident occurred, he was hospitalized at St. Anthony's Hospital, in Rockford, under observation and treatment for compression fracture of eleventh and twelfth thoracic vertebrae, and was admitted to the hospital at Fort Sheridan August 15, 1931, for further treatment. During this time he was in a plaster cast that fit well and had been very well put on; that this cast had been applied at the hospital in Rockford, Illinois, on August 7th. The Adjutant General further stated that physical examination on completion of hospitalization shows a complete recovery; that the claimant walks normally; that the maximum degree of improvement from hospitalization and treatment has been reached; that the claimant is physically fit for the performance of full military duty and further hospitalization or treatment is not necessary, and that the claimant was discharged from the hospital on October 28, 1931 and ordered home; that upon the recommendation of his Company Commander, he was discharged from the service of the State of Illinois because of removal from jurisdiction, having moved to Houston, Texas. From a second letter dated May 4, 1933, he states that supplemental to his report of October 4, 1933, regarding the case of *Claude Echols vs. State of Illinois*, No. 1991, in the Court of Claims, the Attorney General was informed a Board was convened for the purpose of inquiring into the present physical status of the claimant. The board found the diagnosis to be "(1) Compression fracture, slight 11th—12th dorsal vertebrae—-healed, without deformity. (2) Osteo-arthritis, lumbo sacro spine—which existed prior to Military service and was probably not aggravated by the injury sustained August 2, 1931. (3) Syphilis. After the word "Syphilis" there is a question mark in parenthesis. The Board recommended that (1) A history of findings and treatment of Cook County Hospital and St. Lukes Hospital, Chicago, Illinois, be obtained if pos-

sible. (2) That as far as Military service is concerned there is no further need for medical or surgical treatment. (3) That claimant is not entitled to pay under provisions of the Military and Naval Code. (4) An X-ray picture of the lower dorsal lumbar spine be taken at this time.' The following additional data was submitted: 'Claimant is 35 years old, married, two children--14-12 years old, former occupation that of truck driver. Unemployed past two years approximately. He has not worked since his discharge from hospital at Fort Sheridan, August 27, 1931. During the six months following discharge from Fort Sheridan, he received out-patient treatment at Cook County Hospital. He was then sent to the Veterans' Bureau where he was informed he was not eligible for treatment by them, and for the past two months has been receiving treatment twice weekly at St. Lukes Hospital, Chicago,—anti-luetic. It was also ascertained that claimant was under treatment in out-patient department at St. Luke's Hospital, Chicago, for syphilis. The Military Board that examined the claimant felt that the claimant had fully recovered from any injury sustained at camp, and that his present complaints were said to be numerous and indefinite but were not due to Military service, but rather to a rheumatic condition aggravated by syphilis. There was considerable doubt in the mind of the Surgeon General, after examining the X-ray pictures made at Rockford at the time of the injury, that the man ever had a compression fracture of any vertebrae, although one of the Medical officers insisted that he did, but the fact remains it could not be found by examination while the patient was at Fort Sheridan.

"Any officer or enlisted man of the National Guard or Naval Reserve who may be wounded or disabled in any way, while on duty and lawfully performing the same, so as to prevent his working at his profession, trade, or other occupation from which he gains his living, shall be entitled to be treated by an officer of the medical department detailed by the surgeon general, and draw one-half his active service pay, as specified in sections 3 and 4 of this article, for not to exceed thirty days of such disability, on the certificate of the attending medical officer, if still disabled at the end of thirty days, he shall be entitled to draw pay at the same rate for such period as a board of three medical officers, duly convened by order of the Commander-in-Chief, may determine to be right and just, but not to exceed six months, unless approved by the Court of Claims."

Section 10, Article XVI, Military Code.

"In every case where an officer or enlisted man of the National Guard or Naval Reserve shall be injured, wounded or killed while performing his

duty as an officer or enlisted man in pursuance of orders from the Commander-in-Chief, said officer or enlisted man, or his heirs or dependents, shall have a claim against the State for financial help or assistance, and the State Court of Claims shall act on and adjust the same as the merits of each case may demand. Pending action of the Court of Claims, the Commander-in-Chief is authorized to relieve emergency needs upon recommendation of a board of three officers, one of whom shall be an officer of the medical department."

Section 11, Article XVI, Military Code.

"Necessary hospital charges incurred in cases stated in sections 10 and 11, and for beds in open or general wards, shall be paid by the State on proper vouchers made out by the attending medical officer, approved by the Surgeon General."

Section 13, Article XVI, Military Code.

The Attorney General argues:

"It would seem that the only provision made by the legislature for the payment of claims for injuries occurring to enlisted men while on duty are Sections 10 and 11, Article XVI of the Military Code. Section 10 provides that for thirty days the enlisted man shall draw one-half of service pay on the certificate of the medical officer; and if still disabled at the end of thirty days he shall be entitled to draw pay at the same rate for such period as a board of three medical officers may determine to be right but not to exceed six months unless approved by the State Court of Claims.

Under that section the only claim the enlisted man would have against the State for a period of six months would be to draw one-half pay and that only in case the attending medical officers should so certify for the first thirty days and thereafter if a board of three medical officers should so determine. After six months if the medical board should still think it advisable and the Court of Claims should approve, further payments of one-half pay would be made.

Section 11, Article XVI provides that where the enlisted man shall be injured, wounded or killed while performing his duty in pursuance of orders, said enlisted man or his heirs or dependents shall have a claim against the State for financial assistance and the State Court of Claims shall act on and adjust the same as the merits of each case may demand. Pending such action the Commander-in-Chief is authorized to relieve emergency needs upon recommendation of three officers, one an officer of the medical department."

Sections 10 and 11 above referred to, are not in our judgment inconsistent under the rule of statutory construction.

We must give to each of the above sections a construction as nearly as possible as what appears to be the intent of the legislature. The working of Section 10 apparently was to apply to an enlisted man "who may be wounded or disabled in any way while on duty." Section 11 applies when the enlisted man "shall be injured, wounded or killed" while performing his duty in pursuance of orders from the Commander-in-Chief.

If both sections should automatically become applicable to any injury arising to an enlisted man then two separate bodies might at the same time be called upon to adjust the claim for the injury. Certainly the legislature did not intend this. To give each one the proper construction, first apply Section 10 to all cases possible and where that section is broad enough to fully compensate for the injury, no resort need be made to Section 11. In case of death Section 10 could not apply and Section 11 would apply, or if the injury should be so severe that it would be impracticable to apply Section 10, then Section 11 would apply. Under Section 10 the Court of Claims would have no jurisdiction until a payment constituting a period of six months, one-half pay, had been made to the injured man and then such jurisdiction would only be in the way of an approval of the action of a medical board advising that such payment should be made for a period in excess of six months.

It is the opinion of the court that Section 10 became applicable to claimant's injury, and before claimant could invoke the jurisdiction of this court he would have to show that a medical board provided for, had determined that he was entitled to one-half pay for a period in excess of six months, and the board has decided he was not entitled to any such pay for a period of six months.

We cannot hold, as a matter of law, that it is the duty of his officers to see that he worked under safe conditions; that by the very nature of the services rendered by a soldier to a military company, whether in peacetimes or in war, that soldier is required to perform military duties whether in sham battle or not, and we cannot as a matter of law, hold, that the superior officers were required under the circumstances in this case to furnish the claimant a safe place in which to work.

No attempt is made to show either by the proof or evidence that claimant's superior officers knew, or should have known by the exercise of due care and caution, of the depression in the road complained of. Neither could we hold as a matter of law, that he could legally bind the State even if they did know of such depression.

By the very nature of things, military service is not a rocking chair employment.

It appears that all of the claimant's expenses, while at St. Anthony's hospital, Rockford, Illinois, and while in Chicago hospitals were paid. For the reason that the military board had made no finding, in favor of the claimant, we feel that we have no jurisdiction in the case, and the motion to dismiss will, therefore, be sustained.

(No. 2837—Claimant awarded \$714.76.)

JOHN NEWTON, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed November 9, 1937.

Claimant, pro se.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—posthumous child—considered child of employee at time of accident—award may be made for as dependent. A child of State employee, unborn at time of injury to employee, but in being at the time of filing and hearing of claim for compensation, is a legal dependent under the provisions of the Act, and an award may be made for compensation for the benefit of such child, where such employee is found to be entitled to compensation thereunder.

SAME—when award may be made for permanent partial loss of use of hand. Where employee of State sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra hazardous employment, resulting in permanent partial loss of use of right hand, an award for compensation therefor may be made in accordance with the provisions of the Act, upon compliance with the terms thereof.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

For about three weeks prior to the 2d day of October, 1935, the claimant was employed by the respondent as a laborer in the Division of Highways, and was engaged in the

work of patching cement pavements on S. B. I. Route 148, about five miles north and west of Marion.

On the last mentioned date, he had worked a little over time, and about 4:30 P. M. was leaving for home. While getting into a State truck which the respondent furnished for the transportation of such of the workmen who cared to avail themselves thereof, and while on the premises of the respondent at the working site, the driver started the truck, and the claimant was thrown against the rear fender and fell to the pavement, thereby injuring his right wrist.

At the time of the accident, claimant was a married man and aside from one child born on December 31st, 1935, he had no children. Whether such child, born approximately ninety days after the accident, is to be considered as a child of the claimant "at the time of the injury to the employee," within the meaning of those words as used in the Compensation Act, is one of the material questions in this case.

Section 8-J-2 provides a minimum compensation of \$11.00 per week "in case of an employee having one child under the age of sixteen years at the time of the injury to the employee."

The question as to whether a child en ventre sa mere entitled an employee to the benefit of the foregoing provision of the Workmen's Compensation Act, has not been directly passed upon by our Supreme Court. In the case of *American Liability Insurance Co. vs. Ind. Com.*, 342 Ill. 605, the Industrial Commission held that a child en ventre sa mere, if born alive, was to be considered as a child of the employee at the time of the injury. The award of the Industrial Commission was affirmed by the Supreme Court, but the question here involved was not directly presented to that court.

The question was considered by this court in the case of *Elliott vs. State*, 8 C. C. R. 289, and we there held that a child en ventre sa mere was to be considered as a child of the employee at the time of the accident. The question was directly presented to the court in that case, and was fully considered, and we can see no reason for departing from the conclusion there reached.

Upon consideration of the facts in the record we find as follows:

That the claimant and respondent were, on the 2d day of October, A. D. 1935, operating under the provisions of the

Workmen's Compensation Act; that on said date the claimant sustained accidental injuries which arose out of and in the course of his employment; that notice of said accident was given to said respondent and claim for compensation on account thereof was made within the time required by the provisions of the Compensation Act.

That the earnings of the claimant during the year next preceding the injury were \$640.00; and that his average weekly wage was \$12.30.

That the claimant at the time of the injury in question was twenty-six years of age and had one child under the age of sixteen years.

That the necessary first aid, medical, surgical and hospital services were provided by the respondent.

That the claimant was temporarily totally disabled from October 2d, 1935 to February 7th, 1936, and that he sustained the permanent loss of thirty-three and one-third per cent of the use of his right hand.

That under the provisions of Sections 8-B and 8-J-2 of the Compensation Act, the claimant is entitled to have and recover from the respondent the sum of \$11.00 per week for the period of eighteen and two-sevenths weeks, that being the period of his temporary total incapacity for work.

That under the provisions of Sections 8-E and 8-J-2 of the Compensation Act, the claimant is entitled to have and recover from the respondent the sum of \$11.00 per week for a further period of fifty-six and two-thirds weeks, for the reason that the injuries sustained by him resulted in the permanent loss of thirty-three and one-third per cent of the use of his right hand.

That the sum of One Hundred Nine Dollars and Seventy-one Cents (\$109.71) has been paid by the respondent to the claimant to apply on the compensation due him.

That all of the compensation to which the claimant is entitled as above set forth has accrued prior to this date.

It Is THEREFORE ORDERED that an award be entered in favor of the claimant for the sum of Seven Hundred Fourteen Dollars and Seventy-six Cents (\$714.76).

This award being made under the provisions of the Workmen's Compensation Act for injury to a State employee, is subject to the provisions of an Act entitled "An Act Making an Appropriation to Pay Claims Arising Out of In-

juries to State Employees, and Providing for the Method of Payment Thereof," approved July 3d, 1937 (Session Laws of 1937, page 83).

In accordance with the provisions of such Act, this award is subject to the approval of the Governor, and upon such approval, is payable from the appropriation from the Road Fund in the manner provided in such Act.

(No. 2766—Claimant awarded \$304.00.)

JAMES FISH, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed November 9, 1937.

PETER V. FAZIO, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—claim for compensation under Act—what must be shown to obtain award. In order to recover compensation under Act it is incumbent upon claimant to show that the injury complained of was accidental, that it arose out of and in the course of the employment, and that claimant was engaged in employment which was extra hazardous in fact or declared to be under Act.

SAME—same—what must be shown in claim based on heat exhaustion or prostration. One claiming compensation for injuries alleged to have been sustained as the result of heat exhaustion or prostration, must in order to recover, show that because of his duties, he was exposed to a special or peculiar danger from the elements, a danger which was greater than that to which other persons in the community were subjected.

SAME—when evidence insufficient to sustain claim based on heat exhaustion or heat prostration—insufficient to show accident arose out of and in course of employment. Where the only evidence in claim based on heat exhaustion or prostration, is that employee stepped out of truck and remembers nothing thereafter, and that physician diagnosed his ailment as heat exhaustion, which diagnosis does not appear to have been afterward confirmed, and nothing appears as to temperature or weather conditions, at time and place of accident, claim cannot be sustained, as evidence is insufficient to show injury arising out of and in the course of employment.

SAME—when award may be made for permanent partial loss of use of leg. Where employee within Act sustains injuries resulting in permanent partial loss of use of leg, award may be made for compensation for same, for the time and in the manner provided in the Act.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

For some time prior to December 28th, 1934 the claimant was in the employ of the respondent as a truck driver in the

Division of Highways. On the last mentioned date, while driving his truck over an icy road, the truck swerved and crashed into a bridge, and claimant's right knee struck the hand throttle, whereby he sustained a fracture of the patella. He was removed to the hospital, and received the necessary medical, surgical and hospital care and attention at the expense of the respondent.

On May 15th, 1935 claimant returned to work for the respondent as a laborer. He was paid compensation for his temporary total disability from the date of the injury, to-wit, December 28th, 1934, to the date he returned to work, to-wit, May 15th, 1935. All medical, surgical and hospital bills incurred on account of the injury, amounting to the sum of \$968.50, were also paid by the respondent.

Claimant contends that as the result of said injury he has sustained a partial permanent disability, as well as a permanent partial loss of the use of the right leg, and asks for compensation for such partial permanent disability under Section 8-D of the Compensation Act, or, in the alternative, for the specific loss under Section 8-E of such Act.

Claimant returned to work for the respondent as a laborer on May 15th, 1935, and claims to have sustained another injury on July 11th, 1935. The evidence as to an accidental injury arising out of the claimant's employment on the last mentioned date is not at all convincing. No one testified with reference to the conditions existing at the time of the accident, except the claimant. He stated that he commenced work at 8:00 A. M., and went out on a truck with a driver by the name of Quinn, to patrol a section of the highway and see if everything was all right; that there was a washout at a certain point on the highway, and they drove to another point for the purpose of obtaining some pieces of concrete to fill such washout; that at about 9:30 the truck stopped and he got out. After that he remembers nothing as to what happened to him. The driver of the truck was not called as a witness, and his absence is not accounted for.

Claimant was taken to a doctor by the truck driver, and was later taken to Oak Park Hospital, and afterwards to Mother Cabrini Hospital in Chicago. He was examined the same day by Dr. Carmen Joseph Pintozzi who found him apparently unconscious, and who made a tentative diagnosis of heat exhaustion. Apparently he was treated for that condi-

tion, but there is nothing in the record to indicate whether the subsequent developments confirmed the tentative diagnosis. Several spinal punctures were performed and a microscopic examination was made. Claimant continued under the treatment of Dr. Pintozzi until July 29th, 1935 when he was discharged. The doctor testified "I believe a man should follow a sedentary life for some period immediately after this condition;" also that it would be approximately two months after his discharge before claimant would be in proper condition to follow any type of real work, in order to avoid a recurrence, but that within a period of thirty or forty days after his discharge, he should be able to perform the character of work he was performing at the time of the hearing herein. At the time of the hearing claimant was employed by the Sun-kist Pie Company, mixing whipped cream, the duties of which employment did not require any heavy work.

As to the accident and injury of December 28th, 1934, it appears that the claimant has been paid compensation for his temporary total disability, and that all medical, surgical and hospital bills have been paid by respondent. The only question remaining for consideration as to such accident, is whether claimant is entitled to compensation for permanent partial disability or for specific loss of the use of the right leg, or both.

Section 8-E of the Compensation Act provides in part as follows:

"For injuries in the following schedule, the employee shall receive compensation for the period of temporary total incapacity for work resulting from such injury, in accordance with the provisions of paragraphs (a) and (b) of this section, for a period not to exceed sixty-four weeks, and shall receive in addition thereto compensation for a further period subject to limitations as to amounts as in this section provided, for the specific loss herein mentioned, as follows, but shall not receive any compensation for such injuries under any other provision of this Act."

Among the specific disabilities therein mentioned are the following, to-wit:

"15. For the loss of a leg, or the permanent and complete loss of its use, fifty per centum of the average weekly wage during one hundred and ninety weeks."

"17. For the permanent partial loss of use of a member * * * fifty per centum of the average weekly wage during that proportion of the number of weeks in the foregoing schedule provided for the loss of such member * * * which the partial loss of use thereof bears to the total loss of use of such member * * *."

From the foregoing provisions of the Compensation Act, it appears that where the claimant is entitled to compensation for injuries resulting in any of the specific losses mentioned in Section 8-E, he is not entitled to compensation for such injuries under any other provisions of the Act. Consequently the claimant is entitled to compensation for such permanent partial loss of the use of his right leg as is shown by the evidence, but is not entitled to compensation for any other partial permanent disability.

The evidence discloses that there is a limitation of flexion of the right knee of from thirty to forty-five per cent, but no limitation of extension. In our judgment such limitation of flexion, together with a certain amount of crepitation, as shown by the evidence, constitutes the permanent loss of ten per cent of the use of claimant's right leg.

As to the injury of July 11th, 1935, there is no evidence in the record which justifies an award. It is incumbent upon the claimant to prove not only that he sustained an accidental injury which arose in the course of his employment, but also that such injury arose out of the employment. The evidence in the record shows merely that the claimant was riding in an automobile truck in the course of his duties, from 8:00 to 9:30 A. M.; that the truck stopped and he stepped out of it; that he remembers nothing thereafter with reference to his injury; that he was taken to a doctor, later to a hospital; that he apparently was unconscious when he was examined by the doctor who diagnosed his case as heat exhaustion. There is nothing in the evidence to indicate whether the doctor's diagnosis was thereafter confirmed. The driver of the truck, who was with the claimant at the time of the accident, did not testify, and his absence is not explained. There is no evidence in the record as to the temperature or weather conditions at the time and place of the accident.

The question as to whether heat prostration constitutes an accidental injury arising out of the employee's employment, was considered by our Supreme Court in the case of *City of Joliet vs. Ind. Com.*, 291 Ill. 556. In that case the court held that under the facts there in evidence, the employee sustained an accidental injury which arose out of and in the course of his employment. In considering the question the court, on page 558, said:

"The heatstroke occurred in the course of the employment, and there was evidence from which the commission might reasonably conclude that it arose out of the employment. The man was overcome by the heat. In his employment, and because of it, he was exposed to a degree of heat beyond the ordinary temperature of the day."

The case of *Consumers Co. vs. Ind. Com.*, 324 Ill. 152, involved the question as to whether injuries resulting from frost bite constituted accidental injuries arising out of the employment. The injuries in that case resulted from weather conditions which were the direct opposite of those in the City of Joliet case; but the legal principles involved are the same in each case. In its consideration of such principles, the Supreme Court, on page 155, said:

"The question in dispute is whether the injuries suffered by defendant in error arose out of his employment. Injuries resulting from exposure to weather conditions, such as heat, cold, ice, snow or lightning, are generally classed as risks to which the general public is exposed and not within the purview of Workmen's Compensation Acts, although the injured person, at the time he received his injury, may have been performing duties incident to and in the course of his employment. The rule is generally recognized, however, that if an employee, because of his duties, is exposed to a special or peculiar danger from the elements,—a danger that is greater than that to which other persons in the community are subjected,—and an unexpected injury is sustained by reason of the elements, the injury constitutes an accident arising out of and in the course of the employment within the meaning of Workmen's Compensation Acts. If the character of the employment is such as to intensify the risks that arise from extraordinary natural causes, an accident under such circumstances is one arising out of the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. If the accident, under the circumstances of the employment, was merely a consequence of the severity of the elements, to which persons in the locality, whether so employed or not, were equally exposed, it is not compensable."

It is not every case of heat exhaustion or prostration that constitutes an accidental injury arising out of the employment. If the employee is subjected only to such conditions as other people in the same community, it cannot be said that the injury arose out of the employment, as in such case, the conditions causing the injury cannot be said to originate in such employment.

The evidence in the record furnishes no basis for a finding that the injury sustained by the claimant arose out of his employment, and consequently we have no authority to allow an award for the injuries sustained on July 11th, 1935.

"Where a franchise tax is erroneously assessed and no objection is made thereto and no request is made for a hearing thereon in accordance with the statute, and the tax is paid, such payment constitutes a voluntary payment within the legal meaning of those words."

Claimant herein made no objection to the tax assessed against it and made no request for a hearing thereon, paid the tax voluntarily and without protest and with a full knowledge of both its "authorized" and "issued" capital stock. We are compelled to hold that under the provisions of the statute and the decisions of our courts upon the question of voluntary payments, claimant is not entitled to a refund.

The award is therefore denied and the claim dismissed.

(No. 1886--Claim denied.)

CITY OF QUINCY, A MUNICIPAL CORPORATION, ETC., Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed November 9, 1937.

JAMES P. NIELSON, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

NEGLIGENCE—respondent superior—doctrine of, not applicable to State. The State is never liable for the negligence of its officers, servants or agents in the performance of governmental functions, the doctrine of respondent superior not being applicable to it.

ILLINOIS NATIONAL GUARD—maintenance of Armory of, governmental function claim for personal injury due to negligent construction and maintenance of must be denied. In the construction and maintenance of Illinois National Guard Armories the State exercises governmental functions, and is not liable for damages for personal injuries or damages to property, due to the negligence of its officers, servants or agents in such construction or maintenance.

Mr. Justice YANTIS delivered the opinion of the court:

On April 5, 1931 and for many years prior thereto, the State of Illinois was the owner of a property located on the South side of Jersey Street in the City of Quincy, on which was located an Armory Building, built and maintained by the State. On the night of said date one Marguerite Golden was walking along the sidewalk that abutted said Armory Building. Complainant represents that there was a basement beneath such sidewalk of a depth of ten (10) feet, and that there

making it so liable, and where there is a statute affording a remedy to persons suffering loss of property through acts of such inmates, such statute must be strictly complied with, or an award must be denied.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

The complaint herein alleges that on the 14th day of February, A. D. 1934, the claimant was the owner of certain goods and chattels valued at \$139.70, which he then kept in a certain building located at 105-110 North Galena Avenue in the City of Dixon; that on said date said goods and chattels were taken from said building without the knowledge or consent of the claimant; that the claimant is informed and believes that said goods and chattels were taken by certain inmates of the Dixon State Hospital, who had escaped from such institution on that day.

Claimant seeks an award for the value of such goods and chattels, and bases his right of recovery upon the provisions of an Act of the General Assembly entitled, "An Act Concerning Damages Caused by Escaped Inmates of Charitable Institutions over which the State has Control," approved June 21st, 1935, (State Bar Assn. Revised Statutes, 1937, Chapter 23, Par. 372-A) which said Act provides as follows:

"Whenever a claim is filed with the Department of Public Welfare for payment of damages to property, or for damages resulting from property being stolen, heretofore or hereafter caused by an inmate who has escaped from a charitable institution over which the State of Illinois has control while he was at liberty after his escape, the Department of Public Welfare shall conduct an investigation to determine the cause, nature and extent of the damages inflicted and if it be found after investigation that the damage was caused by one who had been an inmate of such institution and had escaped, the said Department may recommend to the Court of Claims that an award be made to the injured party, and the Court of Claims shall have power to hear and determine such claims."

The Attorney General has moved to dismiss the case, and the cause now comes on for hearing upon such motion.

If the claimant has any right to an award, it must arise by virtue of the statute above quoted, as we have heretofore held that there is no liability on the part of the State under the facts set forth in the complaint, in the absence of a statute imposing such liability. *Bangs vs. State*, 8 C. C. R. 508.

Claimant's right to an award being based upon the provisions of the aforementioned statute, he must bring himself within the provisions of such statute.

As we view the matter, the statute contemplates the filing of a claim in the first instance with the Department of Public Welfare, and an investigation by said Department. If, as the result of such investigation, the Department finds that the damage was caused by an escaped inmate of a charitable institution over which the State had control, and while said inmate was at liberty after his escape, the Department may, but is not required to, recommend to this court that an award be made to the injured party. Upon such recommendation being made, and not until then, has this court any jurisdiction to consider the matter.

From the complaint herein it appears that the claimant filed his claim in this court on October 29th, 1935, and at the same time requested the Department of Public Welfare to conduct an investigation and make its recommendation to this court.

There is nothing in the complaint or in the record to show that any investigation has been made by the Department of Public Welfare, or that any recommendation has been made by such Department.

For aught we know, if and when such investigation is made, the Department of Public Welfare may find that the damage was not caused by an escaped inmate; or for other reasons it may recommend the disallowance of the claim; or it may make no recommendation whatsoever;—in any of which events we have no authority to allow an award.

The statutory requirements are preliminary and prerequisite to the filing of a claim in this court, and we have no authority to entertain or consider a claim of this character until such requirements have been complied with.

The complaint in this case has been filed prematurely, and therefore the motion of the Attorney General to dismiss must be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 3019—Claimant awarded \$4,450.00.)

PAULINE EMBREE, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed November 9, 1937.

GILLESPIE, BURKE & GILLESPIE, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—Injury sustained while violating orders or rules of employer—when right to compensation for not barred by. Where employee, a highway maintenance police officer, sustained accidental injuries, resulting in his death, while driving a State automobile, in the performance of his duties, and at the time permitted a civilian to ride with him, in violation of the rules and orders of his superiors, the Police Bureau, he did not merely by such violation, put himself out of the sphere of his employment, so that it could be said that he was not acting in the course of it, but he is only guilty of negligence in such violation, and a claim for compensation by his dependents will not be barred.

SAME—when award for compensation for death may be made under. Where it appears that employee of State sustains accidental injuries resulting in his death, arising out of and in the course of his employment, while engaged in extra-hazardous employment, an award for compensation may be made to those entitled, in accordance with Act, upon compliance with terms thereof.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

From December 16th, 1935 to October 15th, 1936, Ray Embree was in the employ of the State of Illinois, Department of Public Works and Buildings, Division of Highways, as a highway maintenance police officer.

On October 14th, 1936 said Ray Embree was directed by his superior officer to carry certain papers to Chicago in a State car which was assigned to him for that purpose. He left Springfield at 6:00 P. M. on that day, delivered the papers in Chicago, and started on his return trip, traveling on U. S. Route 66, which at that time was the most direct route from Chicago to Springfield. About 2:15 A. M. on October 15th, 1936, at a point on said Route 66 between Lexington and Towanda, the car then being driven by said Ray Embree collided with a truck owned and driven by Arthur J. Gisinger of Cisco, Illinois, whereby said Embree sustained injuries which resulted in his death on the same day.

Said Ray Embree was thirty-five years of age at the time of his death and left him surviving the claimant, his widow, and Betty Jean Embree, his daughter, who was born June 29th, 1923.

No compensation has been paid by the respondent, and the only objection urged to the allowance of an award arises from the fact that said Ray Embree on said trip to Chicago and return was accompanied by an employee of the Secretary of State, in violation of a rule of the Bureau of Police to the

effect that no civilian shall be transported in a police car except on official business or in line of duty.

Under certain circumstances and conditions, the violation of rules or orders may bar a recovery under the Workmen's Compensation Act. In order to bar such recovery, however, it is necessary that the violation of the rules or orders be of such nature as to take the employee outside the sphere of his employment.

In the case of *Republic Iron and Steel Co. vs. Ind. Com.*, 302 Ill. 401, the Supreme Court in considering a similar question, said (page 406):

"The rule is, that where the violation of a rule or order of the employer takes the employee entirely out of the sphere of his employment and he is injured while violating such rule or order it cannot be then said that the accident arose out of the employment, and in such case no compensation can be recovered. If, however, in violating such a rule or order the employee does not put himself out of the sphere of his employment, so that it may be said that he is not acting in the course of it, he is only guilty of negligence in violating such rule or order and recovery is not thereby barred."

The rule there laid down has been followed in numerous cases since that time. Applying the same to the facts in this case, we find nothing in the violation of the rule or order of the Bureau of Police which bars the claimant from recovery.

Upon a consideration of the record herein, the court finds as follows:

1. That said Ray Embree and the respondent were, on the 14th day of October, A. D. 1936, operating under the provisions of the Workmen's Compensation Act; that on said date said Ray Embree sustained accidental injuries which arose out of and in the course of his employment, and which resulted in his death on the same day; that notice of said accident was given to said respondent, and claim for compensation made within the time required by the provisions of such Act; that the earnings of said Ray Embree during the year next preceding the injury were \$1,737.50, and his average weekly wage was \$33.41; that the necessary first aid, medical, surgical and hospital services were provided by the respondent; that said Ray Embree left him surviving Pauline Embree, his widow, and Betty Joan Embree, his daughter, both of whom were totally dependent upon the earnings of said Ray Embree for their support and maintenance; that said Betty Joan Embree was born June 29th, 1923, and there-

fore was thirteen years of age at the time of the death of her father as aforesaid.

That under the provisions of Section 7-A and 7-II-3 of the Workmen's Compensation Act, the amount of compensation to be paid by the respondent on account of the death of said Ray Embree is \$4,450.00; subject, however, to reduction when said Betty Jean Embree arrives at the age of eighteen years, to-wit, June 23d, 1941, provided she is then physically and mentally competent; in accordance with the provisions of Section 7-A of the Compensation Act; that said compensation is payable in weekly installments of \$15.00 each commencing on October 15th, 1936.

That the share of such compensation which otherwise would be payable to said Betty Jean Embree, should be paid to her mother, Pauline Embree, for the support of said child.

That said Pauline Embree is now entitled to have and receive from the respondent the sum of Eight Hundred Forty Dollars (\$840.00), being the amount of compensation which has accrued from October 16th, 1936 to November 12th, 1937.

IT IS THEREFORE ORDERED that the share of such compensation which otherwise would be payable to said Betty Jean Embree shall be paid to her mother, Pauline Embree, for the support of said Betty Jean Embree.

IT IS FURTHER ORDERED that an award be entered herein in favor of the claimant, Pauline Embree, for the sum of Forty-four Hundred Fifty Dollars (\$4,450.00);—subject, however, to reduction when said Betty Jean Embree arrives at the age of eighteen years, to-wit, June 23d, 1941, provided she is then physically and mentally competent;—in accordance with the provisions of Section 7-A of the Compensation Act.

IT IS FURTHER ORDERED that such award be payable as follows: the sum of Eight Hundred Forty Dollars (\$840.00), being the amount of compensation which has accrued from October 16th, 1936 to November 12th, 1937, shall be paid forthwith. The balance of such compensation shall be payable in weekly installments of Fifteen Dollars (\$15.00) commencing November 19th, 1937.

IT IS FURTHER ORDERED that this cause be continued until the first session thereof to be held after said Betty Jean Embree arrives at the age of eighteen years, to-wit, June 23d, 1941, for the entry of such further orders with reference to

the amount of the aforementioned award, or the reduction thereof, as may be in accordance with the provisions of the Workmen's Compensation Act; and that in the meantime, compensation be paid by the respondent as hereinbefore provided.

The foregoing award being made under the provisions of the Workmen's Compensation Act for the death of a State employee, is subject to the provisions of an Act entitled "An Act Making an Appropriation to Pay Claims Arising Out of Injuries to State Employees, and Providing for the Method of Payment Thereof," approved July 3d, 1937 (Session Laws of 1937, page 83).

In accordance with the provisions of such Act, this award is subject to the approval of the Governor, and upon such approval, is payable from the appropriation from the Road Fund in the manner provided in such Act.

(No. 2482—Claim denied.)

TED JOHNSTON, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed November 9, 1937.

JOHN O. COWAN, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—Injuries from exposure to elements—which must be shown in order to constitute accident arising out of and in course of employment, under. One claiming compensation for injuries alleged to have been sustained as the result of a sun stroke, must in order to recover, show that because of his duties, he was exposed to a special or peculiar danger from the elements, a danger which was greater than that which other persons in the community were subjected.

SAME—claim for compensation under—failure to show earnings or ability to earn after accident—no basis on which to compute award. Where claimant fails to produce any evidence of amount of earnings, or as to his ability to earn after accident, there is nothing from which court could compute amount of award if claimant were entitled thereto.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On May 19th, 1934, and for one or two days prior thereto, the claimant, Ted Johnston, was employed by the State of Illinois as a laborer in the Division of Highways, and was

working on U. S. B. L. Route No. 146 near Grantsburg. He worked nine hours a day, and was paid forty cents per hour.

On said 19th day of May, 1934, about two o'clock P. M., while engaged in unloading posts from a truck, the claimant apparently collapsed, and claims to have received a sunstroke or heat stroke. He was immediately taken to the office of Dr. J. L. Jackson at Vienna, Illinois, and at that time had a temperature of 105°, and was in a semi-conscious condition. Dr. Jackson continued to treat him for several days, and claimant was confined to his bed for two weeks after the accident. After two weeks he was able to be up and around.

Claimant contends that he is wholly and permanently disabled, but the record shows that he worked for a number of different employers for short intervals after May 19th, 1934; also that he was on police duty for the City of Vienna from October 30th, 1934 to January or February, 1936; also that he worked for other employers, including the Division of Highways, for short periods after he left the police force. The record also shows that he sustained a heat stroke in 1930 while in the employ of the Jaickes Construction Company.

Counsel seems to have taken it for granted that claimant suffered a heat stroke, but the evidence on that question is far from satisfactory.

The question as to whether a heat stroke constituted an accidental injury arising out of and in the course of the employment, was considered by our Supreme Court in the case of *City of Joliet vs. Ind. Com.*, 291 Ill. 556. In that case the court said (p. 558):

"The heatstroke occurred in the course of the employment, and there was evidence from which the commission might reasonably conclude that it arose out of the employment. The man was overcome by the heat. In his employment, and because of it, he was exposed to a degree of heat beyond the ordinary temperature of the day."

The court there held that under the facts there in evidence, the heat stroke constituted an accidental injury which arose out of and in the course of the employment.

In the case of *Consumers Co. vs. Ind. Com.*, 324 Ill. 152, the employee suffered injuries as the result of frost bite, and contended that such injuries arose out of and in the course of his employment. The underlying principles of law are the same, whether the injuries result from exposure to excessive heat or from exposure to excessive cold. In the *Consumers*

Co. case the question was carefully considered and the authorities reviewed. In arriving at its conclusions, the court there said (page 155):

"The question in dispute is whether the injuries suffered by defendant in error arose out of his employment. Injuries resulting from exposure to weather conditions, such as heat, cold, ice, snow or lightning, are generally classed as risks to which the general public is exposed and not within the purview of workmen's compensation Acts, although the injured person, at the time he received his injury, may have been performing duties incident to and in the course of his employment. The rule is generally recognized, however, that if an employee, because of his duties, is exposed to a special or peculiar danger from the elements,—a danger that is greater than that to which other persons in the community are subjected,—and an unexpected injury is sustained by reason of the elements, the injury constitutes an accident arising out of and in the course of the employment within the meaning of workmen's compensation Acts. If the character of the employment is such as to intensify the risks that arise from extraordinary natural causes, an accident under such circumstances is one arising out of the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. If the accident, under the circumstances of the employment, was merely a consequence of the severity of the elements, to which persons in the locality, whether so employed or not, were equally exposed, it is not compensable."

Under the rule laid down in the Consumers Company case, it devolves upon the claimant to prove that because of his duties, he was exposed to a special or peculiar danger from the elements, a danger which was greater than that to which other persons in the community are subjected.

The only evidence in the record regarding climatic conditions was that it was awful hot, about 98° or 100°. There is nothing in the record to show just where the claimant was working, or to show conditions at the place of work, or to show that it was any hotter where he was working, than it was in any other place in that community. Under the evidence in the record, claimant has not established the fact that he sustained an accidental injury which arose out of his employment.

Even if he had established the fact of an accidental injury arising out of and in the course of his employment, he still has failed to establish his right to an award under the terms and provisions of the Workmen's Compensation Act for any permanent disability.

Undoubtedly he was temporarily totally disabled for some period of time, but aside from the two weeks during which he was confined to his bed, the period of such disability does not appear in the evidence. He makes no claim for a specific loss, but does claim that he is totally and permanently disabled. Such claim, however, is not supported by the evidence. If there is any permanent disability, it is a permanent partial disability.

Section 8-D of the Compensation Act provides that in case of permanent partial disability the claimant shall "receive compensation subject to the limitations as to time and maximum amounts fixed in paragraphs B and H of this section, equal to fifty per centum of the difference between the average amount which he earned before the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident."

As the record now stands, there is no evidence as to claimant's earnings or his ability to earn after the accident, and consequently there is nothing from which the amount of an award for any permanent disability could be computed, if claimant were entitled thereto.

Award denied. Under the provisions of Sec. 19-B of the Compensation Act, petition for review may be filed within 15 days.

(No. 2247—Claim denied.)

J. MYRTLE LEWIS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed November 9, 1937.

Claimant, pro se.

OTTO KERNER, Attorney General; CARL DIETZ and JOHN KASSERMAN, Assistant Attorneys General, for respondent.

SALARY—*claim for additional, during vacation period not availed of—when denied.* The facts in this case are similar to those in *Tripp vs. State*, Case No. 2248, *infra*, and the decision in that case is controlling herein.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein recites that she was relieved from duty as an employee in the Military and Navy Department, upon one-half day's notice, and that having been so relieved she did not receive pay for two weeks' time which would have

constituted her annual vacation period; that the reason for not having received her vacation was the fact that "work taken care of by Colonel S. O. Tripp, for whom claimant worked, was such that neither he nor she could leave, and claimant was not permitted to take her vacation unless Colonel Tripp also decided to leave."

A motion to dismiss the claim has been filed by the Attorney General for the reason that the claim upon its face does not recite a legal basis upon which an award could be made.

This is a similar claim to that of *Stephen O. Tripp vs. State*, No. 2248, decided at this term, and the reasons therein stated for a dismissal of the claim, apply in this matter. The motion of the Attorney General is allowed and the claim dismissed.

(No. 2248—Claim denied.)

STEPHEN O. TRIPP, Claimant, vs. STATE OF ILLINOIS. Respondent.

Opinion Filed November 9, 1937.

Claimant, pro se.

OTTO KERNER, Attorney General; CARL DIETZ AND JOHN KASSERMAN, Assistant Attorneys General, for respondent.

SALARY—*claim for additional, during vacation period not availed of—when denied.* Employee of State Military Department not entitled to additional salary for services rendered during alleged vacation period not availed of by him, as a vacation is a personal privilege that can be waived, and especially when it does not appear that claimant ever requested a vacation or that vacation was denied him.

CIVIL ADMINISTRATIVE CODE—*Section 22 of, not applicable to employees of Military Department of State.* Section 22 of Civil Administrative Code, providing that each of the employees of the several State departments shall be entitled during each calendar year to fourteen days leave of absence with full pay, does not apply to employees of Military Department of State.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant was formerly an Assistant Quarter Master General in the Military and Naval Department of the State of Illinois, and herein makes claim for Two Hundred Eight (\$208.00) Dollars, representing one-half month's salary claimed to be due for the period of two weeks for a vacation

period during the year 1932-1933, to which plaintiff claims he was entitled. In his claim he avers that he did not receive a vacation during said period due to the fact that his work at that time was such that his absence from the office was not practicable; that having been entitled to a vacation which he did not receive he is entitled to an additional two weeks' pay.

The Attorney General has filed a motion to dismiss the claim as it fails to state any legal cause of action against the State.

The Civil Administrative Code contains the following provision, upon which claimant relies, i. e.:

"Each employee in the several Departments shall be entitled during each calendar year to fourteen days leave of absence with full pay."

Sec. 22, Civil Administrative Code.

We do not believe that the Civil Administrative Code is applicable to the Military Department, and even if it were so construed, claimant herein would not have an allowable demand on the facts stated. In the case of *Sanitary Dist. of Chicago vs. Burke*, 88 Ill. App. 196, a laborer had worked overtime and sought additional pay therefor. The court there held that, "The mere fact that the employee has voluntarily worked more than eight hours a day does not of itself authorize a demand for extra compensation, unless it should also appear that extra compensation was agreed upon or was reasonably within the contemplation of the parties at the time."

In *Crooker vs. Sturgis*, 175 N. Y. 158 in passing upon a demand for additional pay because of a vacation period which had not been availed of by the plaintiff, the court held, "A vacation is a personal privilege that can be waived."

It does not appear in the complaint herein that any request for a vacation was ever made by claimant, or such vacation denied to him. It does appear that his employment by the State was terminated upon a summary notice, but the complaint fails to show any ground upon which an additional amount of compensation over the regular wages received by him, could now be allowed.

The motion of the Attorney General to dismiss is granted and the claim dismissed.

(No. 2266—Claim denied.)

REICK, LANGENDORF AND COMPANY, A CORPORATION, vs. STATE OF
ILLINOIS. Respondent.

Opinion filed November 9, 1937.

SIMON T. SUTTON, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN,
Assistant Attorney General, for respondent.

FRANCHISE TAX—paid under mistake of law—no award for refund can be made. Where amount of franchise tax is voluntarily paid under mistake of law, no award can be made for refund of part, alleged to have been paid in excess of amount rightfully due.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant company was incorporated June 16, 1917 with a capital of Fifteen Thousand (\$15,000.00) Dollars. According to the complaint its capital stock was increased on June 27, 1918 to Seventy-five Thousand (\$75,000.00) Dollars. Claimant alleges that of the increased capital stock only one hundred fifty (150) additional shares were issued and that the remaining four hundred fifty (450) additional shares were not issued; that through inadvertence and under a mistake of law claimant, from May 12, 1927 up to and including the year 1932, paid its annual Franchise Tax yearly on the basis of Seventy-five Thousand (\$75,000.00) Dollars instead of Thirty Thousand (\$30,000.00) Dollars; that the first knowledge that claimant had of its alleged overpayment was in the month of March, 1933 when it was so informed by its attorney.

Claimant seeks a refund for the alleged overpayment of Twenty-two and 50/100 (\$22.50) Dollars for each of the years 1927 to 1932 both inclusive, making a total of One Hundred Thirty-five (\$135.00) Dollars.

The Attorney General has filed a motion to dismiss the claim, for the reason that under the law in force at the time of the increase in capital stock, all the capital stock was required to be subscribed before the issuance of a charter or the approval of an amendment to a charter, and that same became subject to the Franchise Tax under the terms of the Corporation Act of 1919; that such tax was properly assessed down to such time as the capital stock might have been re-

duced; that the declaration does not show any reduction in the outstanding capital stock as ever having been made, and that the claim should therefore be dismissed.

A report, dated November 29, 1933, from the Secretary of State's Office, appearing in the Respondent's Statement, contains the following:—

"It appears that the Company has never set up the contention until this year that all of the stock was not issued. Apparently these fees have been paid voluntarily each year, and accepted in good faith by the State."

"Where the amount of Franchise Tax is computed and collected by the Secretary of State in accordance with the law, based on information submitted by claimant, a claim for rebate of a part thereof alleged to have been excessive on account of error in information furnished by claimant will be denied."

Yates vs. Royal Ins. Co., 200 Ill. 202.

Standard Oil Co. vs. Bollinger, 337 Ill. 353.

Under the Corporation Act effective July 1, 1919, the entire capital stock of claimant, i. e. Seventy-five Thousand (\$75,000.00) Dollars, became subject to a tax. There does not appear to have been any such thing as "authorized" stock under that law. It was all "issued" either actually or in legal effect.

The objections made by respondent to a further consideration of the claim are valid. It further appears from the declaration that the payments in question were made by claimant as a mistake of law. The decisions are numerous and well recognized that no award will be made upon such ground. The motion of the Attorney General is allowed and the claim dismissed.

(No. 2073—Claim denied.)

SPELLMAN & COMPANY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed November 9, 1937.

Claimant, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

FRANCHISE TAX—paid thorough negligence or inadvertence, with full knowledge of facts—is voluntary payment—cannot be recovered—failure to avail self of remedies—bars award. This case is controlled by the decisions of the Court of Claims in the cases of *Butler vs. State*, 9 Court of Claims Reports, 503 and *Fried & Bell Paper Co. vs. State*, 9 Court of Claims Reports, 531.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks an award of Twenty and 80/100 (\$20.80) Dollars. The declaration recites that on June 13, 1932 claimant corporation had a total authorized capital stock of One Hundred Thousand (\$100,000.00) Dollars, but that only Fifty-eight Thousand Four Hundred (\$58,400.00) Dollars of such stock had been issued; that claimant, in response to a notice from the then Secretary of State, paid a capital stock tax of Fifty (\$50.00) Dollars, based upon the authorized capital stock, whereas it should have paid only Twenty-nine and 20/100 (\$29.20) Dollars, based upon the capital stock issued and outstanding.

Where the statement submitted by the tax payer has contained the correct figures of existing facts and the Secretary of State has made an erroneous computation or certificate based thereon, the court has heretofore made awards in certain instances. The attention of the court has more recently been called to certain provisions of the General Corporation Act of this State, approved June 12, 1919, whereby the payment of such corporation tax is accorded definite opportunities for a review. This claim having arisen prior to the adoption of the Business Corporation Act, claimant's rights must be determined under the provisions of the Corporation Act as it then existed.

Section 12 of such Act provided that between the 1st day of February and the 15th day of June, the Secretary of State shall mail a notice in writing to each corporation against whom such tax is assessed, notifying the corporation of the amount of the tax assessed against it, and that objections, if any, to such assessment will be heard by the officer making such assessment, upon request by the corporation, on a date not later than the 25th day of June, etc. Under the provisions of such Act the Secretary of State is given authority to change or modify such assessment upon such hearing being had.

The effect of this statute has been considered by the court in a number of recent cases, among them—*Butler Co. vs. State*, C. of C. No. 2500, and *Fried & Bell Paper Co. vs. State*, C. of C. No. 2244. As there stated,

"Where an illegal or excessive tax is paid voluntarily and with a full knowledge of all the facts it cannot be recovered.

"Where a franchise tax is erroneously assessed and no objection is made thereto and no request is made for a hearing thereon in accordance with the statute, and the tax is paid, such payment constitutes a voluntary payment within the legal meaning of those words."

Claimant herein made no objection to the tax assessed against it and made no request for a hearing thereon, paid the tax voluntarily and without protest and with a full knowledge of both its "authorized" and "issued" capital stock. We are compelled to hold that under the provisions of the statute and the decisions of our courts upon the question of voluntary payments, claimant is not entitled to a refund.

The award is therefore denied and the claim dismissed.

(No. 1886--Claim denied.)

CITY OF QUINCY, A MUNICIPAL CORPORATION, ETC., Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed November 9, 1937.

JAMES P. NIELSON, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

NEGLIGENCE—respondent superior—doctrine of, not applicable to State. The State is never liable for the negligence of its officers, servants or agents in the performance of governmental functions, the doctrine of respondent superior not being applicable to it.

ILLINOIS NATIONAL GUARD—maintenance of Armory of, governmental function claim for personal injury due to negligent construction and maintenance of must be denied. In the construction and maintenance of Illinois National Guard Armories the State exercises governmental functions, and is not liable for damages for personal injuries or damages to property, due to the negligence of its officers, servants or agents in such construction or maintenance.

Mr. Justice YANTIS delivered the opinion of the court:

On April 5, 1931 and for many years prior thereto, the State of Illinois was the owner of a property located on the South side of Jersey Street in the City of Quincy, on which was located an Armory Building, built and maintained by the State. On the night of said date one Marguerite Golden was walking along the sidewalk that abutted said Armory Building. Complainant represents that there was a basement beneath such sidewalk of a depth of ten (10) feet, and that there

was an iron lid resting on a metal frame in the sidewalk, such opening being thirty (30) inches wide and thirty (30) inches long, used by the respondent for the purpose of dumping coal into the basement of the Armory Building. Claimant further represents that the iron lid was improperly constructed, that it was not securely fastened and that its defective condition had existed for more than a year prior to the night in question and that such condition was known or could have been known to respondent, had it exercised reasonable care in the maintenance and inspection of such sidewalk.

Marguerite Golden stepped upon the covering of this opening and when it tilted under her weight she was thrown through the opening into the basement beneath such sidewalk, sustaining the injuries complained of. Suit was instituted against the City of Quincy for Twenty-five Thousand (\$25,000.00) Dollars damages, and a settlement was thereafter agreed upon between Marguerite Golden and the City of Quincy whereby she received One Thousand Eight Hundred Sixty (\$1,860.00) Dollars.

The City of Quincy as claimant now seeks an award from the State of Illinois for reimbursement of the sum thus expended, and predicates its claim upon the charge that said accident was due to the negligent construction and maintenance by the State of the coal hole and sidewalk in front of the Armory Building.

The Attorney General has filed a motion to dismiss the claim on the ground that the State could not be held liable for injuries resulting from the tort actions of its servants or employees. The question of whether the State should respond in damages arising through the negligence of its employees has been before the court many times. It is a well established principle of law, supported by the decisions of other courts as well as by numerous decisions of this court, that the State is not liable for the negligence of its officers, servants or agents in the performance of governmental functions. (*Hinchcliff vs. State*, 2 C. C. R. 159, *Petersen vs. State*, 8 C. C. R. 9, *Parks vs. Northwestern University*, 218 Ill. 381 and *Miner vs. State Board of Agr.* 259 Ill. 549.)

In the case of *Kramer vs. State*, 8 C. C. R. 31, claimant sustained injuries in the office of the Civil Service Commission in the State House by tripping over a piece of heavy linoleum which had become worn and broken and was projecting up-

wards from the floor. Recovery was sought upon the theory that it was the duty of the State to maintain and keep the floor in question in proper and safe condition. An award was denied for the reason that the State is not liable for the negligence of its officers, servants or agents in the performance of governmental functions, and the ruling therein stated applies to the present claim. The Doctrine of RESPONDEAT SUPERIOR does not apply to the State. The present claim is based directly upon the alleged negligence of employees of the respondent both in the construction and in the maintenance of the sidewalk in question, and no recovery can be allowed therefor. The motion of the Attorney General is allowed and the claim dismissed.

(No. 2886—Claimant awarded \$268.15.)

WILLIAM BRICKER, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed November 10, 1937.

MILEY & GOMBE, for claimant.

OTTO KERSEN, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award for compensation for permanent partial loss of use of leg may be made under.* Where it appears that employee of State sustains accidental injuries, arising out of and in the course of his employment, resulting in permanent partial loss of use of leg, while engaged in extra hazardous employment, an award for compensation for same may be made, in accordance with the provisions of the Act, upon compliance with the terms thereof.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

For a short time prior to the 29th day of November, A. D. 1935, the claimant was employed by the respondent as a truck driver in the *Division of Highways*, and was working on a roadside planting project on S. B. I. Route 45 in Saline County.

On the last mentioned date, while unloading a tree weighing approximately three hundred pounds, the tree slipped and the entire weight thereof fell upon the claimant, whereby he was thrown backwards and sustained injuries to his left leg at the knee. He was placed under the care of Dr. R. B. Ny-

berg of Carbondale who continued to treat him until February 21st, 1936, and he returned to work on March 4th, 1936.

The only evidence in the record as to claimant's earnings was to the effect that he was paid sixty cents per hour for not to exceed eight hours per day, forty hours per week, or one hundred thirty hours per month.

He claims an additional amount for temporary total disability and also asks for an award for the permanent partial loss of the use of his left leg.

It is agreed that at the time of the accident both parties were working under the provisions of the Compensation Act; that on said date the claimant sustained an accidental injury which arose out of and in the course of his employment; that notice of the accident was given and claim for compensation on account thereof was made within the time required by the Act; that claimant's wages were approximately \$78.00 per month; that he had three children under the age of sixteen years at the time of the accident; that all medical, surgical and hospital expenses were paid by the respondent, and that claimant was paid \$151.56 for temporary total disability.

The only questions for determination are whether claimant is entitled to further compensation for temporary total disability; whether he has sustained the permanent partial loss of the use of his left leg; and if so, the extent of such disability and the amount of compensation to be paid therefor.

Upon a consideration of all of the evidence, in the record, we find that as the result of the accident in question, the claimant was temporarily totally disabled from the date of the accident in question to the 4th day of March, A. D. 1936, to-wit, for thirteen and two-sevenths weeks, and that he is entitled to compensation therefor at the rate of Thirteen Dollars (\$13.00) per week.

We further find that as the result of the accident in question the claimant sustained the permanent loss of ten per cent of the use of his left leg, and that under the provisions of Sections 8-E-17 and 8-J-2 he is entitled to nineteen weeks' compensation therefor, at the rate of Thirteen Dollars (\$13.00) per week.

We further find that all of the aforementioned compensation has accrued at this time.

The total amount due the claimant in accordance with the foregoing findings, is Four Hundred Nineteen Dollars and Seventy-one Cents (\$419.71). He has heretofore been paid the sum of One Hundred Fifty One Dollars and Fifty six Cents (\$151.56) to apply thereon, leaving a balance due of Two Hundred Sixty Eight Dollars and Fifteen Cents (\$268.15).

Award is therefore hereby entered in favor of the claimant for the sum of Two Hundred Sixty Eight Dollars and Fifteen Cents (\$268.15).

This award being made under the provisions of the Workmen's Compensation Act for injuries to a State employee, is subject to the provisions of an Act entitled "An Act Making an Appropriation to Pay Claims Arising Out of Injuries to State Employees, and Providing for the Method of Payment Thereof," approved July 3rd, 1937 (Session Laws of 1937, page 83).

In accordance with the provisions of such Act, this award is subject to the approval of the Governor, and upon such approval, is payable from the appropriation from the Road Fund in the manner provided in such Act.

(No. 2697—Claim denied.)

PETE STANLEY, ADMINISTRATOR OF THE ESTATE OF BILLIE ROE STANLEY, DECEASED, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed December 14, 1937.

D. L. DUTY and GORDON FRANKLIN, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

Highways—maintenance of, governmental function—negligence of employees of State in construction or maintenance of—State not liable for death of person as result of—award on grounds of equity and good conscience cannot be made. The facts in this case are similar to those in Garbutt, Admr. vs. State, No. 2246, supra, and what was said in that case is equally applicable herein.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

On July 10th, 1935 Pete Stanley, as Administrator of the Estate of Billie Roe Stanley, deceased, filed his complaint herein, in which he alleges in substance as follows:

1. That prior to and on May 16th, 1935 the respondent through its Department of Public Works and Buildings, was engaged in the construction, maintenance and repair of hard-surfaced roads, and particularly State Highway No. 147 extending in a northerly and southerly direction through the Village of Goreville, in Johnson County.

2. That on said date and for a long time prior thereto, respondent permitted an old abandoned well to exist on the right-of-way of said State Highway No. 147, adjacent to the thickly settled portion of the Village.

3. That such well was ten (10) or fifteen (15) feet deep and five (5) or six (6) feet in diameter; that the earth surrounding the well was caving into the same; and that a rotten and dilapidated barricade or curb was permitted to stand on the surface of the earth surrounding the well.

4. That such well was attractive to children of tender years, who had long been permitted to congregate and play in the vicinity of such well.

5. That all of such facts were known to the respondent, or by the exercise of reasonable care, might have been known to it.

6. That it was the duty of the respondent to keep and maintain such highway in good and safe repair and condition, and free from holes and pitfalls, and to safely barricade said well; that the respondent carelessly and negligently permitted said highway to be and remain in a dangerous and unsafe condition, and permitted said well to be and remain open and uncovered and with a dilapidated curb or barricade around the same.

7. That on the day aforesaid, plaintiff's intestate, Billie Roe Stanley, was an infant of the age of six (6) years, and lived close to the aforementioned well.

8. That on said day said child was attracted to such open, exposed and unguarded well, and while at play about the same, and as a direct result of the negligence of the respondent in maintaining such well on said highway, and the further negligence of the respondent in failing to safely guard and enclose the same, said child unavoidably fell into the water which had accumulated in such well and thereby came to his death.

9. That the conduct of the respondent as hereinbefore set forth, was wilful and wanton; and that the death of said

child was not the result of any want of care either on the part of such child, or on the part of anyone charged with his care.

10. That said decedent left him surviving his father and mother; that his father, Pete Stanley, was duly appointed administrator of the estate of said decedent, and as such administrator prosecutes this suit, in which he seeks to recover the sum of \$10,000.00 on account of the death of said decedent.

The Attorney General has moved to dismiss the case for the reason that there is no liability on the part of the State under the facts set forth in the complaint. The claimant has moved to strike the respondent's motion to dismiss.

For the purpose of the motion to dismiss, the allegations of fact as set forth in the complaint must be taken as true.

Claimant bases his right to an award on either of the following grounds, to-wit:

1. Equity and good conscience.
2. Notwithstanding the general rule that the respondent, in the exercise of its governmental functions, is not liable for the carelessness and negligence of its servants and agents, yet the State should be held liable where the acts and conduct of the servants and agents are wilful or wanton and there is no contributory negligence on the part of the injured party.

In the case of *Crabtree vs. State*, 7 C. C. R. 207, after a careful consideration of the previous decisions of this court, we held that the law creating the Court of Claims did not create any new liability against the State, nor increase or enlarge any existing liability; that the liability of the State is limited to cases in which the State would be liable either at law or in equity, if the State were suable; and that unless the claimant can bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure such an award.

In the case of *Titone vs. State*, decided at the January Term, 1937, the question here presented was again raised. The authorities were again reviewed, additional citations given, and the rule laid down in the Crabtree case was reaffirmed. Such rule has been applied in thirty (30) cases which are reported in Volume 8 of the Court of Claims Re-

ports, as well as in numerous other cases since decided which have not yet been published.

We have repeatedly held that the State in the construction and maintenance of its hard-surfaced roads is engaged in a governmental function, and that in the exercise of such functions, is not liable for the negligence of its servants and agents in the absence of a statute making it so liable; that the liability, if any, rests upon the negligent servant or agent, and not upon the State.

Counsel for claimant admit that such is the general rule, but contend that an exception to the general rule exists in cases where the acts and conduct of the servants and agents of the State are wilful or wanton, and where there is no contributory negligence on the part of the injured person.

Some years ago such an exception was recognized in several cases, but the court in subsequent decisions has refused to follow such rule, and it is no longer recognized by this court.

In the opinion denying a rehearing in the case of *George Franklin Garbutt, Admr. vs. State*, No. 2246, filed at the September Term, 1937, the question here under consideration was directly before the court, and we there held:

"If the State is not liable for the ordinary negligence of its servants and agents, there is no principle of law under which it can be held liable for the gross or wanton negligence of such servants and agents, in the absence of a statute making it so liable. The purported exception has no basis in law, and is no longer recognized by this court."

The law as laid down in the Garbutt case was re-affirmed in the case of *Durkiewicz vs. State*, No. 2484, decided at the same term.

Under the law as above set forth, there is no liability on the part of the respondent.

The departmental report of the Division of Highways referred to in claimant's statement, indicates that the well was to be filled by the contractor, but that the sub-contractor for personal reasons failed to fill the same. As to whether there is any liability on the part of the contractor or sub-contractor, we express no opinion. In any event, there is no liability on the part of the State.

The motion of the claimant to strike is denied, and the motion of the Attorney General to dismiss is sustained.

Case dismissed.

(No. 3070—Claimant awarded \$307.60.)

HANS BEREFORD, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed December 14, 1937.

EARLE A. KLOSTER, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made under.* Where it clearly appears that employee of State sustained accidental injuries, arising out of and in the course of his employment, while engaged in an extra hazardous enterprise, an award for compensation for same may be made, in accordance with the terms of said Act, upon compliance with the terms thereof.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

On the 3d day of September, 1936 the claimant was in the employ of the respondent as a laborer in the Department of Public Works and Buildings, Division of Highways, and was engaged in repairing a bridge on U. S. Route No. 34, about three miles east of Gulfport, in Henderson County. While engaged in the performance of his duties a heavy cement test beam fell on his right hand, crushing the index finger thereof so badly that it had to be amputated above the second joint.

From the stipulation of facts herein, we find as follows:

1. That claimant and respondent were, on the 3d day of September, 1936, operating under the provisions of the Workmen's Compensation Act.

2. That on said day the claimant sustained accidental injuries which arose out of and in the course of his employment.

3. That notice of the accident was given to said respondent, and claim for compensation on account thereof made within the time required by the provisions of said Act.

4. That claimant was in the employ of respondent for less than one year preceding the accident; that the annual earnings of persons of the same class in the same employment and same location, during the year preceding the accident, were Eight Hundred Dollars (\$800.00); and the average weekly wage was Fifteen Dollars and Thirty-eight Cents (\$15.38).

5. That claimant at the time of the injury was a single man.

6. That necessary first aid, medical, surgical and hospital services have been provided by respondent.

7. That claimant was temporarily totally disabled from the date of his injury as aforesaid, to November 12th, 1936, and has been paid in full for such temporary total disability.

8. That claimant has sustained the loss of the index finger on his right hand.

9. That claimant is therefore entitled to have and receive from the respondent the sum of Seven Dollars and Sixty-nine Cents (\$7.69) per week for forty (40) weeks, as provided in Section Eight (8), Paragraphs E-2 and E-7 of the Workmen's Compensation Act, as amended.

10. That all of such compensation has accrued prior to this date.

Award is therefore entered in favor of the claimant for the sum of Three Hundred Seven Dollars and Sixty Cents (\$307.60).

This award being subject to the provisions of an Act entitled "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," approved July 3d, 1937, (Session Laws of 1937, Page 83), is, by the terms of such Act, subject to the approval of the Governor, and upon such approval is payable from the Road Fund, in the manner provided by such Act.

(No. 3071—Claim denied.)

RUBINELLI-ROCCA, INCORPORATED, Claimant, vs. STATE OF ILLINOIS.
Respondent.

*Opinion filed October 12, 1937.
Rehearing denied December 14, 1937.*

WILLIAM JEROME CAPONIGRI, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE,
Assistant Attorney General, for respondent.

ILLINOIS LIQUOR CONTROL ACT—license fee paid thereunder—claim for refund on ground of inability to obtain Federal license—when award for denied. A claimant who voluntarily, and without protest, and not under duress or compulsion pays license fee under Liquor Control Act but is unable

to avail itself of same, on account of inability to secure Federal license is not entitled to a refund of such payment, in the absence of a statute authorizing same.

Mr. Justice YANTIS delivered the opinion of the court:

Claimants, after making application in the usual manner, obtained from the State of Illinois a license as a manufacturer of alcoholic liquors, under the provisions of the Illinois Liquor Control Act, Chapter 43, Illinois State Bar Statutes, 1935. Such license was issued on the 25th day of August, 1934, and claimants paid the required fee of Five Hundred (\$500.00) Dollars therefor.

Claimants now seek a refund of such license fee, claiming that they never were able to avail themselves of the privileges granted by such license, due to the fact that they were subsequently unable to obtain a further license from the Federal Liquor Control Commission, and were therefore unable to engage in the business for which they had obtained the Illinois permit. They further state that the Illinois Liquor Control Commission has approved their claim for refund.

A motion to dismiss the complaint has been filed by the Attorney General, on the ground that such refund is sought for a tax paid voluntarily without protest and without duress.

The contention of the Attorney General is supported by the pleadings. Claimants voluntarily paid the required fee for the license which they desired to obtain from the State of Illinois. In so doing they are charged with knowledge of the statutory provisions of the Act governing the issuance of the license so desired. There is no provision or authority of law for a refund of such license fee in case of the mere non-user of such license, regardless of the reasons therefor, except as contained under Section 26 of Chapter 43, Illinois State Bar Revised Statutes, 1935. The Statement, Brief and Argument, filed by claimants herein, discloses that the reason they failed to obtain from the Federal authorities the necessary authority to operate was that claimants had prior thereto been convicted for violation of the Liquor Laws, in the United States District Court. Such condition of facts does not take this case out of the usual rule, to-wit:

"Where Claimant voluntarily pays a tax or license fee without protest, and not under duress or compulsion, no refund will, in the absence of statute, be made."

Modern Laundry Co. vs. State, 8 C. C. R. 36.

Block vs. State, No. 2971, Court of Claims Opinion filed May 12, 1937.

Oppenheimer & Co. vs. State, 6 C. C. R. 465.

Ill. Glass Co. vs. Chicago Telephone Co., 234 Ill. 535.

The Arundel Corp. vs. State, 8 C. C. R. 506.

The motion of the Attorney General is allowed and the claim is dismissed.

(No. 3052—Claim denied.)

WILLIAM BEHENKE, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed December 13, 1937.

DIADUL & SAKELSON, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—making claim and filing application for compensation within time required in—condition precedent to jurisdiction of court. Where no claim for compensation is made within time fixed in Act, court is without jurisdiction to proceed with hearing on claim thereafter made.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Prior to and on the 25th day of July, A. D. 1936 claimant was in the employ of the respondent as a highway maintenance patrolman, and was engaged in such work as is usually incident to the maintenance of hard-surfaced highways.

On Saturday, July 25th, 1936, while in the course of his employment and while engaged in fighting a forest fire, he stumbled and fell, and thereby bruised and skinned a portion of his left leg.

First aid treatment was given and claimant returned to work on the next Monday morning and worked regularly until October 1st, 1936, when he ceased working for the respondent.

After the accident he was told to take it easy, and was assigned to the work of driving the truck, which was less arduous than the work he previously performed. He kept his leg bandaged, and after waiting a long time for authority to be treated at a State hospital, finally consulted his family physician on September 14th, 1936.

He now claims that his left leg is permanently disabled; that he has a hernia on the right side; that both such conditions resulted from the aforementioned accident; and that he is entitled to compensation for his present disability under the Workmen's Compensation Act of this State.

The respondent contests liability on several grounds, only one of which is necessary to be considered.

One of the defenses urged by the respondent is that no claim for compensation was made within the time required by Section 24 of the Workmen's Compensation Act. Such section provides, among other things, that "no proceedings for compensation under this Act shall be maintained unless claim for compensation has been made within six months after the accident."

Claimant does not contend that any claim for compensation was made prior to the filing of the complaint herein, to wit, on January 27th, 1937, being more than six months after the accident.

Our Supreme Court has held in numerous cases that a claim for compensation within the time required by the Act is jurisdictional, and is a condition precedent to the right to maintain proceedings under such Act. *City of Rochelle vs. Ind. Com.*, 332 Ill. 386; *Inland Rubber Co. vs. Ind. Com.*, 309 Ill. 43; *Bushnell vs. Ind. Com.*, 276 Ill. 262; *Haiselden vs. Ind. Board*, 275 Ill. 114.

Under the decisions of our Supreme Court above referred to, the motion of the Attorney General must be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 3125—Claim denied.)

RHOLAND E. DUNCAN, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed December 14, 1937.

Claimant, pro se.

OTTO KERNER, Attorney General; MURRAY P. MUENE, Assistant Attorney General, for respondent.

HIGHWAYS—*maintenance of governmental function.* The State exercises a governmental function in the construction and maintenance of public highways, and is not liable for the negligence of its servants or agents in connection therewith.

Negligence—respondent superior—not applicable to State. The State in the exercise of a governmental function is never liable for the negligence of its officers, agents or employees, in the absence of a statute creating such liability and in this State there is no such statute.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

The complaint in this case alleges that on the 21st day of May, A. D. 1937 claimant's Chrysler sedan was properly parked at a filling station on S. B. I. Route 126 just west of Litchfield, Illinois; that while said car was so parked, one of the employees of the respondent in the Division of Highways, backed an Illinois highway maintenance truck into the same, thereby cutting a hole through the metal right rear door and otherwise damaging such car to the extent of \$35.70, for which amount he asks an award.

The Attorney General has moved to dismiss the case on the ground that the State is not liable under the doctrine of *respondent superior* for the acts of its servants and agents.

We have repeatedly held that the State in the maintenance of its hard-surfaced roads is engaged in a governmental function, and that in the exercise of such functions, the State is not liable for the negligence of its servants and agents in the absence of a statute making it so liable.

This rule has been stated so often in the decisions of this court that the citation of authorities would seem unnecessary. Numerous authorities are cited in the following cases which support the proposition above announced. *Braun vs. State*, 6 C. C. R. 104; *Ryan vs. State*, 8 C. C. R. 361; *Durkiewicz vs. State*, No. 2484, decided at the September term, 1937; *Garrutt, Admr. vs. State*, No. 2246, also decided at the September term, 1937.

The rule of law which makes a private employer responsible for the negligent acts of his servants and agents in the performance of their duties, does not apply to the State while engaged in the exercise of any of its governmental functions, in the absence of a statute creating a liability for such acts.

This rule is of general application and has been recognized for many years. The liability, if any, rests upon the negligent servant and agent, and not upon the State.

The motion of the Attorney General must therefore be sustained.

Motion allowed. Case dismissed.

(No. 3129—Claim denied.)

BENSON PRICE AND MARIE PRICE, Claimants, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed December 14, 1937.

NATHAN BENNETT and JOSEPH L. MACK, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE,
Assistant Attorney General, for respondent.

NEGLIGENCE—employee of Division of Highways—property damage—State not liable for. In the construction and maintenance of its hard surfaced highways, the State exercises a governmental function, and it is not liable for the negligence of its officers, agents or servants in connection therewith, in the absence of a statute making it so liable, and in this State there is no such statute.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

The complaint herein alleges that on the 28th day of June, A. D. 1937 the claimant, Benson Price, was the owner of a certain automobile; that on said date, about five o'clock p. m., the claimant, Marie Price, was driving said automobile in a southerly direction on Canal Street in the City of Blue Island, Illinois; that said Benson Price was then riding as a passenger in said automobile; that both claimants were in the exercise of all due care and caution; that the claimant Marie Price brought her car to a stop preparatory to crossing the intersection of said Canal Street and Chicago Avenue in said City of Blue Island; that the respondent through one of its employees in the Division of Highways then and there so carelessly and negligently drove and operated a certain Ford automobile owned by said respondent, that it ran into and collided with the automobile of the claimant, Benson Price, whereby said automobile was demolished and both of the claimants sustained personal injuries; for all of which they ask an award in the sum of \$900.00.

The Attorney General has moved to dismiss the case on the ground that the State is not liable for the negligence of its servants and agents in the absence of a statute making it so liable.

We have repeatedly held that the State in the construction and maintenance of its hard-surfaced highways is engaged in a governmental function, and that in the exercise

of such functions, it is not liable for the negligence of its servants and agents in the absence of a statute making it so liable. *Chumbler vs. State*, 6 C. C. R. 138; *Braun vs. State*, 6 C. C. R. 104; *Ryan vs. State*, 8 C. C. R. 361; *Durkiewicz vs. State*, No. 2484, decided at the September term, 1937.

Numerous other authorities are given in the cases cited, and it would serve no useful purpose to repeat them here.

The motion of the Attorney General must therefore be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 2231—Claim denied.)

STANDARD FELT CORPORATION, Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed March 13, 1935.

Rehearing denied December 14, 1937.

GIBSON, DUNN & CRUTCHER and HENRY B. ELY, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

FRANCHISE TAX—*claim for refund of amount in excess of that due—statute affording remedy to claimant—failure to avail self of—bars award for refund. Where statute affords remedy to person claiming to have been assessed tax in amount in excess of that rightfully due, for correction of such assessment, and it fails to avail itself of such remedy, but pays tax without compulsion or duress, no award can be made for refund of any such excess amount.*

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This claim was filed August 10, 1933 for the sum of One Hundred Eighty-seven Dollars and Forty-two Cents (\$187.42). The claimant is a corporation organized under the laws of the State of California having its principal office in the City of Alhambra, California.

The declaration alleges that on January 22, 1927 the claimant applied to the Secretary of State of the State of Illinois for a certificate of authority to transact business in Illinois, and a certificate was duly issued by the Secretary of State, and that continuously since that time the claimant has complied with all the laws of this State in relation to the right

of foreign corporations to transact business in Illinois, and that claimant is engaged in the sale of felt goods within this State.

At the time of the application for certificate of authorization to do business in this State the claimant informed the Secretary of State that its issued stock was Eight Hundred Fifty Thousand Five Hundred Dollars (\$850,500.00) consisting of Four Hundred Twenty-five Thousand Five Hundred Dollars (\$425,500.00) of One Hundred Dollar (\$100.00) par value common stock and Four Hundred Twenty-five Thousand Dollars (\$425,000.00) of One Hundred Dollar (\$100.00) par value preferred stock; that between February 1, and June 15, 1927 the Secretary of State notified claimant of an assessment for the annual franchise tax for the year of 1927, which assessment was computed on the entire capital stock of claimant, and upon the proportion thereof actually employed in the State of Illinois, and this assessment was the sum of Sixty-three Dollars and Fifty-four cents (\$63.54) which was duly paid by the claimant.

It is further alleged that on December 31, 1927 the claimant retired five hundred shares of its preferred stock of a total principal value of Fifty Thousand Dollars (\$50,000.00) or as claimant puts it, Fifty Thousand Dollars (\$50,000.00) of the principal stock of the claimant corporation was, in accordance to the claimant's Articles of Incorporation providing for the redemption of its preferred stock, retired by the claimant, thus reducing its issued capital stock; that notice was given to the Secretary of State of this reduction of issued stock in claimant's annual report filed with the Secretary of State of Illinois, about the 10th day of February, 1928 pursuant to the law of Illinois relating to the determination and assessment of annual franchise tax.

It is also alleged that before the 15th day of June, 1928, the claimant was notified by the Secretary of State that the assessment for its annual franchise tax for the year 1928 was the sum of Seventy-six Dollars and Twenty-five Cents (\$76.25) and that it was an over-assessment in the sum of Four Dollars and Forty-eight Cents (\$4.48); that the last mentioned sum was paid to the defendant by mistake, due to the above mentioned error of the Secretary of State of the State of Illinois.

Averments similar in principal were made for the following years: 1928 wherein it was alleged the sum of Twelve Dollars and Ten Cents (\$12.10) was overpaid; 1929 wherein it was alleged the sum of Forty-eight Dollars and Forty Cents (\$48.40) was overpaid; 1930 wherein it was alleged the sum of Forty-two Dollars and Seventy-seven Cents (\$42.77) was overpaid; 1931 wherein it was alleged the sum of Forty-one Dollars and Eighty-six Cents (\$41.86) was overpaid, and 1932 wherein it was alleged the sum of Thirty-seven Dollars and Eighty-one Cents (\$37.81) was overpaid.

It is further averred also that demand was made on account of such overpayments upon taxes levied by the Secretary of State of the State of Illinois for the above mentioned years, and the Secretary of State was requested to review these payments and correct the same and refund the monies paid by mistake to the Secretary of State and the Secretary of State advised the claimant that he would not refund the money so paid and referred the claimant to this court.

And because the claimant had reduced its issued capital stock on successive dates, different amounts for the different years are claimed as overpayments, and that each one of the years the Secretary of State was notified of the reduction but did not, in figuring the tax, take into consideration these successive reductions when he computed the franchise tax for those years, and that for the year 1929 an increase of capital stock over the original amount was considered, and the claimant contends that had the Secretary of State used the actual issued stock figure of which he had notice, there would have been no increase in capital stock tax due in 1930 and reliance is had upon Sections 105 and 106 of Chapter 32, of Cahill's Statutes for 1929. Said Section 105 provides that "each corporation for profit, including railroads and except insurance companies, * * * shall pay an annual license fee or franchise tax to the Secretary of State of five cents on each one hundred dollars of the proportion of its issued capital stock * * *."

And Section 106 provides that "In ascertaining the amount of the issued capital stock represented by business transacted and property located in this State, the sum of the business of any foreign or domestic corporation transacted in this State and the total property of such corporation located within this State shall be divided by the sum of the

total business of the corporation, and the total property of the corporation wherever situated."

Nowhere in the declaration is it alleged that such payments by claimant were made under duress or protest. Other provisions of the statute are cited and relied upon by the claimant and several of the opinions of this court are cited and relied upon and more particularly the case of *The Caledonia Co. vs. State of Illinois*, 6 Ct. Cl. 176, 178 (1929) wherein this court said: "This court has held in numerous cases that when the facts show that a franchise tax was paid through an error in computation, or where the franchise tax was erroneously paid that the claimant is entitled to a refund of the franchise tax which was in excess legally due the State."

The declaration is not signed by counsel.

The Attorney General contends that the claimant did not discover the error hereinbefore referred to until about February 3, 1933 on which date the claimant made complaint to the Secretary of State for the overpayments in 1928, 1929, 1930, 1931 and 1932; that since the Secretary's attention has been called to the error of the reduction of the capital stock, the Secretary of State has acceded to claimant's request and did correctly base the franchise tax for the year 1933 on the issued capital stock of Four Hundred Twenty-five Thousand Five Hundred Dollars (\$425,500.00).

It also appears from the file that the notice that was sent out annually by the Secretary of State suggested that if the claimant had any objection to the assessment that it should take the matter up with the Secretary of State Department within ten days, but no objections were ever made.

It seems that in the past this court has held that where it appears from undisputed facts that a franchise tax in excess of the amount due was paid through mutual mistake of fact an award will be made. (*Commercial Nat'l. Bank & Trust Co. vs. State*, 7 C. C. R. 122.)

This court also has held that where the amount of franchise tax is computed and collected by the Secretary of State in accordance with the law based upon information submitted by claimant, a claim for rebate of a part thereof alleged to have been excessive on account of error in information furnished by the claimant, will be denied. (*Seth Seiders, Inc. vs.*

State, 7 C. C. R. 9.) (*William Wrigley Jr. Co. vs. State*, 7 C. C. R. 153.)

Section eighty-five of Chapter 32 of the Corporation Act then in force provides that each foreign corporation admitted to do business in this State under the provisions of this or of any other section in addition to a copy of its charter, shall keep on file in the office of the Secretary of State, a duly authenticated copy of each instrument amending its charter.

While it is alleged in the declaration that the Secretary of State was in each instance notified of the reduction of the capital stock of the claimant, the provision of the statute last above mentioned does not appear to have been given consideration. The exact question before the court does not seem to have been heretofore presented to the court.

In the case of *Henry Yates, Insurance Superintendent, vs. Royal Insurance Company*, 200 Illinois 202, in the Supreme Court of this State, said on page 206:

'The mere fact that the Act under which the money was paid was unconstitutional, and the tax for that reason illegally laid, is not sufficient to authorize an action to recover back the amount paid. This principle has received the assent of the courts and law writers generally. Mr. Cooley, in his work on Taxation, (2d ed. p. 809), says: 'That a tax voluntarily paid cannot be recovered back, the authorities are generally agreed. And it is immaterial, in such a case, that the tax has been illegally laid, or even that the law under which it was laid was unconstitutional. The principle is an ancient one in the common law, and is of general application. Every man is supposed to know the law, and if he voluntarily makes a payment which the law would not compel him to make, he cannot afterwards assign his ignorance of the law as the reason why the State should furnish him with legal remedies to recover it back.' 'Money voluntarily paid to another under a mistake of the law, but with knowledge of all the facts, cannot be recovered back.' (18 Am. & Eng. Ency. of Law,—1st ed.—223.) This court has declared this same doctrine in numerous cases, among them being *Elston vs. City of Chicago*, 40 Ill. 514; *People vs. Miner*, 46 Id. 374; *Swanston vs. Jams*, 63 Id. 165; *Union Building Ass. vs. City of Chicago*, 61 Id. 439; *Walser vs. Board of Education*, 160 Id. 272; *Otis vs. People*, 196 Id. 542.

Judge Dillon, in his work on Municipal Corporations, (3d ed. sec. 944), in discussing this question, states the law to be: 'Money voluntarily paid to a corporation under a claim of right, without fraud or imposition, for an illegal tax, license or fine, cannot, there being no coercion, no ignorance or mistake of facts, but only ignorance or mistake of the law, be recovered back from the corporation, either at law or in equity, even though such tax, license fee or fine could not have been legally demanded and enforced.' And in Section 946: 'Where there is no mistake or fraud, a voluntary payment cannot be recovered on the mere ground that the one party was under no legal obligation to pay and the other had no right to receive. Where the

party would recover back taxes which it is under no legal obligation to pay, the payment must be compulsory."

There having been no compulsory means used to collect the taxes in question and complainant having failed to comply with Section 85 above referred to, we therefore hold that claimant is not entitled to recover in this instance, and the cause is dismissed.

ADDITIONAL OPINION ON PETITION FOR REHEARING.

MR. JUSTICE YANTIS delivered the opinion of the court :

Following the denial of an award in the above entitled cause by the opinion of the court, filed March 14, 1935, a Petition for Rehearing was filed. The original opinion was partly based upon claimant's purported failure to comply with the provisions of Section 85 of Chapter 32 of the Illinois Corporation Act, wherein corporations are required to file in the office of the Secretary of State, duly authenticated copies of amendments to their charters. Claimant's Petition for Rehearing calls attention to the fact that it was a foreign corporation, authorized by its original Articles of Incorporation to retire its stock without amendment, and that it had in fact filed notice with the Secretary of State of Illinois of its retirement of stock.

The claim presented a question which so far as the court is informed has not heretofore been passed upon in this State, i. e. as to whether capital stock of a corporation which is "retired" without an amendment of its charter is subject to a franchise tax? Assuming that Section 85 does not apply, the court is of the opinion that the further reasons assigned in the original opinion for denial of an award are sufficient. Section 112 of Chapter 32 of the GENERAL CORPORATION ACT, State Bar Statutes of 1929, provided that upon notice being given by the Secretary of State, notifying corporations of the amount of franchise tax assessed against them for the year next ensuing, that objections, if any, to such assessment would be heard, etc., upon request within ten days thereafter, with the further proviso for a continuance of such hearing for cause shown.

This court has held that neglect and failure upon the part of a corporation to observe such preliminary right of objection will preclude this court from making an award. The

record herein fails to disclose any objections as contemplated by such section, having been made by claimant, and the Petition for Rehearing is denied and the claim is dismissed.

(No. 3114—Claim denied.)

JOHN MUNSCH, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed December 14, 1937.

Claimant, pro se.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

PLEADING—rules of court—when failure to comply with justifies dismissal of claim. Complaint must substantially comply with Rules 4 and 5 of Court of Claims, so that respondent may know nature of claimant's demands, in order to make proper defense thereto and to enable court to pass intelligently upon questions presented, and where it is impossible to ascertain from complaint, nature of demand or amount claimed, same is materially defective in both form and substance and claim must be dismissed.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

The complaint filed in this case is as follows:

Complaint of payment of State Liquor License twice in 1934.

May 16, 1934, Application No. 15969, License No. E16791.

July 16, 19334, Application No. 22164, in favor of John Munsch, 3401 Armitage Avenue, Chicago, Illinois."

The Attorney General has moved to strike the complaint for the reason that the same does not comply with the rules of this court.

Rules Four (4) and Five (5) of this court have reference to the form of complaint, and provide as follows:

"Rule 4. (a) Such complaint shall state concisely the facts upon which the claim is based and shall set forth the address of the claimant, the time, place, amount claimed, the State department or agency in which the cause of action originated and all averments of fact necessary to state a cause of action at law or in equity."

* * * * *

"Rule 5. (a) The claimant shall state whether or not his claim has been presented to any State department or officer thereof, or to any person, corporation or tribunal, and if so presented, he shall state when, to whom, and what action was taken thereon; and, he shall further state whether or not he has received any payment on account of such claim and, if so, the amount so received.

(b) The claimant shall also state whether or not any third person or corporation has any interest in his claim, and if any such person or corporation has an interest therein the claimant shall state the name and address of the person or corporation having such interest, the nature thereof, and how and when the same was acquired."

There is no disposition on the part of this court to be technical or exacting in matters of form, particularly when a claim is filed by the claimant pro se. Nevertheless, there must be a substantial compliance with the requirements of the foregoing rules so that the respondent may know the nature of the claimant's demand, in order to make a proper defense thereto, and in order to enable the court to intelligently pass upon the questions involved. *Wolfe vs. State*, 5 C. C. R. 18; *Lewson vs. State*, 5 C. C. R. 80.

From the complaint as above set forth, it is impossible to ascertain the nature of the claimant's demand or the amount claimed. Furthermore, no attempt is made to comply with the requirements of Rule 5. The complaint is materially defective both in form and substance, and does not comply with the rules of the court.

The motion of the Attorney General must therefore be sustained.

Motion allowed. Complaint stricken.

(No. 2027—Claimant awarded \$103.50.)

SPENCER ANDERSON, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed December 14, 1937.

VERNON G. BUTZ, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ and MURRAY F. MILNE, Assistant Attorneys General, for respondent.

WORKMEN'S COMPENSATION ACT—when award may be made under. Where it appears that claimant is an employee, that while such employee, he sustained accidental personal injuries, arising out of and in the course of his employment, while engaged in extra hazardous employment, an award for compensation for such injuries will be made, when claim therefore is filed within time and in place provided in Act, in accordance with the provisions thereof.

SAME—claim for compensation under by State employee— must be filed in Court of Claims. In Section 6 (6) of the Act to create the Court of Claims, approved June 25, 1917, as amended, the Court of Claims is given jurisdiction to hear and determine the liability of the State for accidental injuries suf-

to be in the course of employment by any employee of the State, such determination to be made in accordance with the rules prescribed in the Act commonly called the Workmen's Compensation Act, the Industrial Commission being hereby relieved of any duty relative thereto, and claims by such employees for such accidental injuries must be filed in the Court of Claims, the Industrial Commission being without any jurisdiction therein.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein, Spencer Anderson, seeks an award under the terms of the Illinois Workmen's Compensation Act for injuries received by him on June 2, 1931 while employed as head baker at the Kankakee State Hospital. He originally filed his application for compensation with the Industrial Commission on June 2, 1932. He later dismissed same, and thereafter, on December 10, 1932, filed his application for an award with the Court of Claims. Respondent contends that such application was not filed within the limitation of one year after the date of the injury, or within one year after the date of the last payment of compensation, and that therefore his action is barred under the terms of the Workmen's Compensation Act, Section 24. Claimant contends that inasmuch as the Compensation Act expressly provides that claims arising under the Act must be filed with the Industrial Commission, claimant has fulfilled his duty, by having actually filed his application with the Industrial Commission as directed by Section 24 of the Act. In making this contention claimant disregards the language contained in the Act to create the Court of Claims, etc., approved June 25, 1917 as amended. In Section 6 (6) thereof, the Court of Claims is given jurisdiction "To hear and determine the liability of the State for accidental injuries or death suffered in the course of employment by any employee of the State, such determination to be made in accordance with the rules prescribed in the Act commonly called the 'Workmen's Compensation Act,' the Industrial Commission being hereby relieved of any duty relative thereto."

It is apparent from the foregoing that the entire consideration of a claim by a State employee is to be before the Court of Claims and must be filed therein, nothing pertaining thereto being left within the jurisdiction of the Industrial Commission. In reaching its determination as to the merits of such applications the Court of Claims is governed by the

various rules laid down by the Workmen's Compensation Act.

Fortunately for claimant herein, his mistake was discovered in apt time, and his application was filed with the Court of Claims on December 10, 1932. The last payment resulting from claimant's employment by the State was paid to him, according to the record, on the 24th day of December, 1931, being for wages for 13 days' employment and for additional unproductive time when not able to work, being seventeen days in all during June, 1931, for which he was paid. The injury occurred on June 2, 1931 and he worked off and on during the following days until the 13th day of June. He received full pay for the month of July, in the sum of one hundred seventy-four (\$174.00) dollars, that being his regular monthly wage. His sworn statement of claim is for temporary total disability of four hundred forty-five and 86 100 (\$445.86) dollars, and for medical care and attendance of forty-seven and 50 100 (\$47.50) dollars, or a total of four hundred ninety-three and 36 100 (\$493.36) dollars. In the reply brief filed by his counsel on September 15, 1937, claimant agrees with a computation made by counsel for respondent that the total amount of recovery due him for temporary total incapacity should be four hundred three and 50 100 (\$403.50) dollars, with the further contention therein made by claimant that he should receive an additional award of twenty-eight and 80 100 (\$28.80) dollars for the expense incurred in taking evidence in this cause. This latter contention is without merit and there is no basis for same under the terms of the W. C. A.

The proof herein supports the claim for compensation and shows that the accident in question arose out of and in the course of claimant's employment by the State; that both claimant and respondent at the time were operating within the terms of the Workmen's Compensation Act; that claimant sustained an accidental injury on June 2, 1931 when he slipped on the tile floor in the bakery at the Kankakee State Hospital, striking his left shin against the sharp corner of a wooden step causing an abrasion and bruise thereof. The injury was reported to Dr. Francis J. Sullivan, a member of the Kankakee State Hospital staff. He thereafter received treatment from Dr. Sullivan and another attendant, and as the leg began to swell he was confined to his home. About the

middle of August claimant worked for approximately three weeks at Walnut Grove as a chef, but as the wound reopened and the leg again began to swell he was unable to work until April 1, 1932.

Compensation at the rate of fifteen (\$15.00) dollars per week for the period between June 13, 1931 and April 1, 1932 - thirty-eight and one-half (38½) weeks (omitting the three weeks that claimant worked in August) figures five hundred seventy-seven and 50/100 (\$577.50) dollars. From this should be deducted one hundred seventy-four (\$174.00) dollars compensation heretofore paid, leaving a balance of four hundred three and 50/100 (\$403.50) dollars for temporary total disability as claimed. An award is hereby made in favor of claimant for the latter sum.

This award being subject to the provisions of an Act entitled, "An Act making an appropriation to pay compensation claims of State employees and providing for the method of payment thereof," approved July 3, 1937 (Sess. Laws 1937, p. 83) and being, by the terms of such Act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from the appropriation from the General Revenue Fund in the manner provided for in such Act.

(No. 2982—Claim denied.)

JENNIE C. HOLDERBY, MOTHER OF JOSEPH C. HOLDERBY, Claimant, vs.
STATE OF ILLINOIS, Respondent.

Opinion filed December 14, 1937.

CROW & LOEFF, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*making claim for compensation within time fixed in Act condition precedent to jurisdiction.* Making claim for compensation and filing application for same within time fixed by Act is a condition precedent to jurisdiction of court to hear claim, without which the court is powerless to proceed with hearing.

~~same—same—time fixed in Section 24 of Act dates from date of accident—not from date of death resulting from.~~ Section 24 of the Workmen's Compensation Act, fixing the time within which claim and application for compensation must be made, in order to give the court jurisdiction, refers

of the accident as fixing the date from which the time shall run; not the date of death where death results therefrom, or the date when the effects of the accident have become apparent.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The complaint herein alleges that prior to and on the 21st day of May, 1935, Joseph C. Holderby was in the employ of the respondent as a member of the Illinois State Highway Police; that on said date he sustained accidental injuries which arose out of and in the course of his employment, and which resulted in the death of said Joseph C. Holderby on the 17th day of September, A. D. 1935; that the claimant is the mother of said decedent; that she was solely dependent upon him for her support;—and asks for compensation under the provisions of the Workmen's Compensation Act of this State.

The Attorney General has moved to dismiss the case on the ground that it does not appear that claim for compensation was made within six months after the accident, nor does it appear that application for compensation was filed within one year after the date of the injury, or within one year after the date of the last payment of compensation, as required by Section 24 of the Compensation Act.

For the purposes of this motion, the allegations of fact as set forth in the complaint must be taken as true.

From such complaint it appears that claimant's intestate was injured on May 21st, 1935, and that he died on September 17th, 1935. The complaint herein was filed September 16th, 1936.

Section 24 of the Workmen's Compensation Act provides as follows:

"No proceedings for compensation under this Act shall be maintained unless claim for compensation has been made within six months after the accident, provided, that in any case, unless application for compensation is filed with the Industrial Commission within one year after the date of the injury, or within one year after the date of the last payment of compensation, the right to file such application shall be barred."

The complaint alleges that notice of the accident was given immediately, but it is not alleged in the complaint, nor is it contended by the claimant, that any claim for compensation was made by or on behalf of the claimant's intestate or by or on behalf of the claimant, at any time prior to the filing of the complaint herein, to wit, September 16th, 1936.

It is contended on behalf of the claimant that the claim for compensation required by Section 24 is required only in cases of "injuries" which do not result in death, and that claim for compensation is not required in cases where such injuries result in death.

Claimant also contends that her right to compensation did not accrue to her until the death of said Joseph C. Holdenby on September 17th, 1935, and that therefore she had one year from that date in which to file her application for compensation, and that she was not required to file the same within one year after the date of the injury.

We cannot agree with such construction of the statutory provisions. Claim for compensation is required not only for the protection of the employee, but also in order that the employer may have an opportunity to investigate the case. In considering this question, Angerstein in "The Employer and the Workmen's Compensation Act of Illinois," page 906, says:

"From the standpoint of the employer prompt claim should be made so that he will know whether compensation is claimed, may promptly determine if it is a meritorious case, and so that he may pay compensation if the case is meritorious, or prepare to protect his interests if it is not."

The question as to the proper construction of the provisions of Section 24 was before our Supreme Court in the case of *Central Car Works vs. Ind. Com.*, 290 Ill. 436, and the court there said, page 439:

"The statute of this State refers to the accident as fixing the date from which the time shall run. Even if the injury may be regarded as occurring only after the effects of the accident have become apparent, we would not be justified, where the express language of the statute requires the claim to be made within six months after the accident, in extending the time to await the development of the injury. The legislature has seen fit to fix the time for making claim for compensation at six months after the accident. By another section of the statute provision is made for reviewing the award and for re-establishing, increasing, diminishing or ending the compensation if the disability of the employee shall have recurred, increased, diminished or ended. These provisions are within the domain of legislative power and the court is without authority to modify them. If they operate unjustly the remedy is in the amendment of the law."

Our Supreme Court has held in numerous cases that the making of claim for compensation within the time required by the statute is jurisdictional, and is a condition precedent to the right to maintain a proceeding under the Compensation Act. *City of Rochelle vs. Ind. Com.*, 332 Ill. 386; *Inland Rub-*

ber Co. vs. Ind. Com., 309 Ill. 43; *Bushnell vs. Ind. Com.*, 276 Ill. 262; *Haiselden vs. Ind. Board*, 275 Ill. 114.

Such court has also held that where application for compensation is not filed within one year after the date of the injury, or within one year after the date of the last payment of compensation, the claim is absolutely barred. *DuQuoin School District vs. Ind. Com.*, 329 Ill. 543; *Chicago Board of Underwriters vs. Ind. Com.*, 322 Ill. 511.

The law as thus laid down has been applied in numerous cases decided by this court.

Claimant's intestate was injured on May 21st, 1935 and died on September 17th, 1935, and therefore had nearly four months in which to make claim for compensation for the injuries so sustained by him, and to file application therefor, had he desired to do so. On the other hand, claimant also had ample time to comply with the requirements of Section 24, to wit, over two months, to make claim for compensation, and over eight months to file application for compensation.

Claimant having failed to comply with the requirements of the statute, we have no authority to allow an award, and the motion of the Attorney General must be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 1984—Claim denied.)

WILLIAM LEPSKI, ADMINISTRATOR OF THE ESTATE OF ORILLA GARWOOD,
DECEASED, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed December 14, 1937.

WILLIAM G. THON AND DAVID G. STONE, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

DEDICATION OF PROPERTY FOR PUBLIC USE—effect of deed of. Where a portion of land is acquired for public use, by deed of dedication, instead of by condemnation, the payment of the consideration agreed upon has the same effect as the assessment of damages in condemnation and includes all damages to the remainder of the land, the same as in condemnation proceedings.

PROPERTY DAMAGE—to part of land not acquired by State in deed of dedication—as result of construction of public improvement—when award for denied. Where a grantor conveys a portion of his land to the State, for public use, by deed of dedication, he cannot recover for any damages to the remainder of said land, which might result from a proper construction, or the use and occupation of a public improvement upon the land conveyed.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant brings this suit in this court as Administrator of the Estate of Orilla Garwood, deceased, and seeks an award of \$18,000.00, alleging that in the construction of a highway, the State caused damage to her property in that sum.

In July, 1931, deceased was the owner of a tract of land described as follows, to-wit:

Beginning 296.8 feet East of the Northwest corner of the Northeast quarter of Section Fourteen (14) Township Forty-six (46) North, Range Nine (9) East of the Third Principal Meridian; thence South fourteen degrees East 588 feet; thence South 510 feet and being the Southwest corner of real estate conveyed to Harmon A. Garwood by deed dated March 19, 1912 and recorded in the Recorder's office of Lake County, Illinois, in Book 181 of Deeds on page 601; thence East from said point of beginning 290 feet along the South line of said real estate of Harmon A. Garwood; thence South 226 feet; thence West parallel with the North line 290 feet; thence North 226 feet to the place of beginning; situated in the County of Lake and State of Illinois (except that part North of State Route Highway Number 173.

At that time, the land was bisected by a gravel road. Some four acres of land lay north of the road, and some two or three acres of this land were submerged, and some six acres lay south of the road. The State built Route 173 in 1931 and the road seems to have been relocated and claimant's intestate conveyed a right of way for highway purposes to the State for \$150.00. The State proceeded with the construction of the highway on the right of way so acquired.

From the testimony it would appear that the grade of the new roadway was some four feet higher than the grade of the old gravel road. The strip of land deeded to the State was some 290 feet long and the grade in front of the house, about eight and one-half feet, we assume, above the level of a nearby lake, and as one proceeds westerly this grade increases so that on the west line, it is several feet higher. No claim is made for the property so deeded. The adjoining lake is known as Channel Lake.

Owing to the great variance in the testimony of the witnesses for the State and the witnesses for the claimant, this court went to the premises in question, and viewed the roadway, the premises and adjacent property.

It is contended by claimant that she had sold approximately four acres abutting Channel Lake, being the north four acres of the tract, and also being north of the highway, for the sum of \$7,000.00, and because of the increase grade

in the highway built by the State, the south part of the land, consisting of approximately six acres had been greatly damaged.

We found a very uneven tract of land on the south side of the road grown up with weeds, with a sign located therein advertising "Worms for Sale." The claimant no longer has any interest in the land north of the road. There were some trees on the premises; a part of the premises had been used as a sand or gravel pit, and an old dilapidated house, barely fit for human habitation, was located on the south six acres.

It would serve no purpose to review the evidence in detail. A part of this six acres, and a comparatively small part, had been used for gardening, and it is contended that the highway built and known as Route 173 cut off the drainage of this land, and also cut off a view of the lake from the house, being a story and a half high. It is also contended that the approach driveway from the highway onto the premises was short and steep, and people were reluctant to drive with automobiles or other vehicles down onto the premises. From a view of these premises, it would appear that there were not many occasions when one would find it convenient or necessary to drive down upon the six acre tract. The sand and gravel pit it appears, has been abandoned.

We have, however, carefully examined the testimony of Francis S. Baker, a Chicago realtor, a witness for the claimant. He testified that he had known the property for two years prior to 1931, and that before the highway was built, the value of the six acres lying south of the road was \$2,800.00 per acre and that after its construction, the total value was \$5,000.00, and that he had considered the future use of the property, that is, the six acres in fixing this value.

It appeared to the court, as we viewed the premises in question, and the surrounding territory, that there were not many homes in either direction in close proximity to the house in question, and the testimony of Mr. Baker is not persuasive as to value.

Claimant herself testified that at one time she had been offered \$25,000.00 for all of the premises, and that this offer had been made by an ice man, and it also developed that he was related to her. Like Mr. Baker's testimony, that also was not convincing to the court.

A witness for the State, Mr. Robert C. Abt, a man who had a vast amount of experience in real estate business for a period of fifteen years in that vicinity and who knew the property in question, and had seen it many, many times, both before and after the construction of the highway, testified that the house was about sixty-five years old and in a poor state of repair; that the six acres of land, prior to the construction of the highway, that is prior to July 1, 1931, had been used for a gravel pit; that the elevation of the premises on the six acres in question, had been materially changed; that the entire property consisted of holes where sand and gravel had been removed; that there was always an incline at the point of approach to the new highway; that there is adjoining the property, ninety acres of a subdivision to the east and south of these six acres, about three per cent of which had been sold and improved prior to the construction of the highway for summer cottages; that the highest and best use of that portion of the Garwood property before construction was for a gravel pit and that after construction, the highest and best use, was the same; that neither before or after construction, was the property in question desirable for subdivision purposes; that the cost of putting the property in condition would not justify the expense; that the fair cash market value immediately prior to the construction of the highway was \$250.00 per acre and that the fair cash market value immediately after the construction, was \$250.00 per acre; and this in the main is the testimony of Mr. Meinersmann, a real estate man with vast experience in selling real estate in that vicinity, with possibly the exception that he was of the opinion that the building of the highway had improved the property.

In *Lampp vs. State*, 6 C. C. R. 349, and in *Baber vs. State*, opinion filed by Court of Claims December 11, 1935, and rehearing denied February 9, 1937, this court held that a claimant is not entitled to an award for damages to land not taken where compensation has been paid for land taken; in a voluntary conveyance of a right of way over land to the State it will be conclusively presumed that all damages were included in the consideration paid for such conveyance the same as an assessment of damages in a condemnation suit would be presumed to embrace.

The claimant had testified that she had discussed the change of grade with three men from Waukegan. Presumably, they were representatives of the Highway Department, and she was told by them that the grade would not be changed more than four feet, and presumed that she meant four feet higher than the old gravel road, and a fair construction of the testimony is that the old gravel road had a grade of about four feet higher than the surrounding land.

This court and other courts are committed to the rule that where damages are allowable for property not taken, the measure of damages is the difference in the fair cash market value of the property before and after the construction; said value being based on the highest and best use for which the property was and is so immediately available as to affect the fair cash market value.

The Attorney General argues that the claimant in this case is not entitled to an award for the reason that she has been paid for the land actually used, and for the reason that it must be conclusively presumed that all the damages were included in the consideration paid her for her conveyance the same as an assessment of damages on a condemnation would be presumed to embrace, and cites *Lampp vs. State*, 6 C. C. R. 349 and *Baber vs. State*, opinion filed by Court of Claims December 11, 1935, rehearing denied February 9, 1937.

The fair cash market value is the price which a given piece of property will bring if sold on the market under ordinary circumstances, for cash, assuming that the owners are willing to sell and the purchaser is willing to buy. *Phillips vs. Town of Scales Mound*, 195 Ill. 353.

The Attorney General argues that the claimant has no right to recover in this case because of the conveyance and dedication to the State by claimant's intestate, which has the same effect as a judgment in a condemnation proceeding, and bars the claimant from a recovery, and cites *C. R. I. & P. Ry. Co. vs. Smith*, 111 Ill. 363, wherein the court said:

"We regard the deed from Burcky, for the public use of this railroad, as having the same effect upon the rights of the parties, with respect to lot 11, that a condemnation of the same land for such public use would have had,—the one being a voluntary conveyance made for a public use, and the other amounting to a statutory conveyance for such use. Had this right-of-way been acquired by condemnation, Burcky would have had made to him, compensation for the value of the strip of land one hundred feet wide taken, and also an assessment of all the damages to the residue of lot 11 to result from

the operation of the railroad. The rule is, that the appraisalment of damages in a case of condemnation embraces all past, present and future damages which the improvement may thereafter reasonably produce. *Mills on Eminent Domain*, Sec. 216, and cases cited; *Chicago and Alton R. R. Co. vs. Springfield and Northwestern R. R. Co.*, 67 Ill. 112; *Keokuk and Eastern R. R. Co. vs. Henry*, 79 Id. 290."

It follows that had the State condemned this right-of-way as against claimant's intestate, who was the owner of the land at and prior to the time of the construction of Route 173, no recovery could have been had for the damages here sued for. Such damages would have been included in the assessment of damages made on the condemnation, and whether in fact included or not, they would have been conclusively presumed to have been included. The same result, we conceive, follows from claimant's intestate's voluntary conveyance of the right-of-way.

In *Atterbury vs. C. I. & St. L. Ry. Co.*, 124 Ill. App. 330, the court held that:

"where a right-of-way for a railroad is conveyed by deed it will be conclusively presumed that all damages resulting to the balance of the grantor's land from the proper construction and operation of the railroad were included in the consideration paid therefor."

To the same effect is *Lewis on Eminent Domain*, Volume 2, Second Edition, page 702, section 293.

In the case of *Glenbard Golf Club, Inc. vs. State*, 8 C. C. R. 651, we held that:

"The burden is upon the petitioner to show the fair cash market value of the property, and alleged injury must be based upon lawful and proper elements of damage and not upon conjecture or speculation."

After a careful analysis of the testimony of the several witnesses for the claimant, we feel that their testimony is based upon conjecture and speculation.

In the case of the *City of Chicago vs. Lord*, 276 Ill. 571, the Supreme Court said at page 575:

"In ascertaining the compensation to be made to the owner of property appropriated for a public use he is entitled to its value for the most profitable use for which it is available. This availability, however, does not refer to a future possibility but to a present capacity for a use which may be anticipated with reasonable certainty and made the basis of an intelligent estimate of value. 'Possible or imaginary uses are to be excluded, nor can the owner show the probable future use of the property.' (*Chicago, Burlington and Quincy Railroad Co. vs. City of Chicago*, 149 Ill. 457.) 'Nothing should be allowed for imaginary or speculative damages or such remote or inappreciable damages as the imagination may conjure up and which may or may not occur

in all the future." (*Jones vs. Chicago and Iowa Railroad Co.*, 68 Ill. 389; *Chicago and Pekin Union Railroad Co. vs. Peoria and Farmington Railroad Co.*, 114 Ill. 415; *Chicago and Northwestern Railroad Co. vs. Town of Chicago*, 157 Ill. 48; *Chicago, Burlington and Queen Railroad Co. vs. Reisch & Bros.*, 247 Ill. 350.)

The Attorney General points out that there is nothing in the record that shows any reasonably expected demand in the immediate future for subdivision of the property in question; that on the contrary, the record shows that this property is adjoined on the east and south by a 90 acre tract subdivided in 1927 in which only 3 or 4 per cent of the lots have been disposed of by the subdividers and built upon. He also points out that despite these facts claimant's evidence as to value is predicated upon the use of the six acres for subdivision purposes.

In *Phillips vs. Town of Scales Mound*, 195 Ill. 353, at page 362, the Supreme Court held:

"The only criticism made upon the first instruction is the use of the following words: 'And they are further instructed that they are not to consider the price which the property would sell for under special or extraordinary circumstances, but its fair cash market value if sold in the market, under ordinary circumstances, for cash, and not on time, and assuming that the owners are willing to sell and the purchaser is willing to buy.' It is sufficient to say in regard to this instruction, that this court has approved of an instruction, containing the same language." Authorities were cited herein.

Claimant has filed a brief, a supplemental brief and a reply brief to the Attorney General's brief and it is not claimed that the opinions of the Supreme Court herein quoted or the opinions of this court have been in any way modified or changed. As a matter of fact no comment is made thereon although counsel for claimant have been very diligent in citing authorities but this court has heretofore held that where private property is not taken but is damaged for public use, the property owner is entitled to recover, and the proper measure of damages is the difference in the fair cash market value of the property before and after the construction; said value being based on the highest and best use for which the property was and is so immediately available as to affect the fair cash market value, but in none of these cases cited by claimant, is it contended that the owner of the premises had, for a valuable consideration, conveyed the property taken.

As we view the facts herein, no award can be allowed in this case because of the conveyance by claimant's intestate to the State of the right-of-way, that having the same effect as a condemnation of the same land for such public use would have had, the one being a voluntary conveyance made for public use and the other amounting to a statutory conveyance for public use, the rule being that the appraisement of damages in a case of condemnation embraces all past, present and future damages which the improvement may thereafter reasonably produce.

An award, therefore, is denied.

(No. 2735—Claimant awarded \$1,267.90.)

PETER J. FRIEDERS, Claimant. vs. STATE OF ILLINOIS. Respondent.

Opinion filed December 15, 1937.

PLAIN & PLAIN, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—Injury sustained while on way home—while moving necessary machinery from scene of actual labors—when arising out of and in course of employment—when award for compensation may be made. Where employee of Division of Highways, employed to cut grass along State Highway, using his own team and mowing machine, is injured by being struck by automobile, within forty minutes after finishing his work, while driving his team pulling mowing machine to his home, from actual scene of labor, using most available and usually travelled route, such injuries are accidental and arise out of and in the course of his employment, and an award for compensation for such injuries is justified.

SAME—Injury sustained after leaving place of employment—exception to general rule denying compensation for. While the general rule is that an employment does not begin until the employee reaches where he is to work and does not continue after he has left place of employment, still a reasonable time must be allowed before and after such time and included within the period of such employment, where the employee is at a place where he might reasonably be expected to be at such time and is injured in the course of his employment, and what is a reasonable time depends upon the facts in each case.

MR. JUSTICE YANTIS delivered the opinion of the court:

No apparent dispute exists as to the facts herein. Claimant, Peter J. Frieders, had been hired by the Division of Highways of Illinois to cut grass and weeds along the S. B. I.

Highways in DuPage and Will Counties. He furnished his own team and mower, and went to such points as directed by his superiors in the Highway Department. On October 10, 1934 he had been cutting grass along State Route No. 59 just south of the Will County line. Along this particular road he had a stretch of nine miles on both sides of the highway, and had been mowing along this section for several days. He took the mower from his home and left it at the scene of his labors, but drove his team back and forth daily, using a spring wagon in which to ride to and from his work. On the date last above stated he had finished his work about 5 o'clock p. m., and as there would be no other work at this point during the remainder of the year, he tied his wagon behind the mower and started home by the best available route and over the usually traveled way. He proceeded along Route No. 59 for a certain distance, then along a two and one-half mile graveled road to Route No. 65, then over Route No. 65 until he was a short distance west of Frontenac. At that point a man named Bray, driving an automobile owned by one Curtis Middleton, ran into claimant from the rear, causing a wreck and a runaway and throwing claimant to the ground, resulting in a spiral fracture of the neck of the Femur of the left leg, with a displacement of certain boney structure. He was confined to the hospital for six weeks and was then removed to his home, where, after walking with the aid of crutches for about three months, he began the use of a cane. He was totally disabled until April 15, 1936. At the present time his left leg is about one and one-half ($1\frac{1}{2}$) inches shorter than the right leg, and he has suffered an apparent loss of power and function in the left leg of twenty-five (25) per cent.

At the time of the accident claimant was married and was the father of eight children then under sixteen (16) years of age. As a result of the injury he incurred a doctor's bill of One Hundred Three (\$103.00) Dollars, due Dr. W. H. Schwingel, of Aurora, Illinois, and a hospital bill of One Hundred Twenty-nine and 90/100 (\$129.90) Dollars, due St. Charles Hospital of Aurora, neither of which has apparently been paid. The record further discloses that claimant attempted to collect damages from Curtis Middleton, the owner of the automobile which struck him, but that said Curtis Middleton is insolvent; that the fixtures in the tavern operated by him are mortgaged and the automobile in question has a

lien against same; that the driver Milton Bray is financially irresponsible and was using the car for his own personal purposes at the time of such accident.

Claimant was receiving Fifty (50) Cents per hour for the work in which he was engaged, and during the year next preceding the accident had received Two Hundred Fifty-nine (\$259.00) Dollars, being employed during the whole or part of sixteen (16) weeks, making an average weekly wage of Sixteen and 13/100 (\$16.13) Dollars per week. The weekly minimum wage upon which an award would be computed is increased from Seven and 50/100 (\$7.50) Dollars to Fourteen (\$14.00) Dollars per week, under the provisions of Section 8 (j)2. by reason of four children then and there under the age of sixteen (16) years. Temporary total disability, if any is due, amounts to Three Hundred Seventy (\$370.00) Dollars for the twenty-six and three-sevenths ($26\frac{3}{7}$) weeks of total disability; permanent partial specific loss of twenty-five (25) per cent of the use of the leg, under the provisions of Sections 8 (e), 15 and 17 of the Act, being one-fourth ($\frac{1}{4}$) of one hundred ninety (190) weeks, or Six Hundred Sixty-five (\$665.00) Dollars.

Respondent contends that the accident did not arise out of and in the course of the employment, for the reason that claimant was not actually engaged in the operation of mowing at the time of the injury, and that the accident occurred while claimant was enroute to his home after completing the task in which he had been engaged.

The general rule stated in the *Shegart* case, i. e.:

"That an employment does not begin until the employee reaches where he is to work and does not continue after he has left the place of employment," (*Shegart vs. Ind. Com.*, 336 Ill. 223),

is modified by a number of other decisions. Incidentally, in the *Shegart* case the claimant had never yet entered the employ of the prospective employer.

In the *Vincennes Bridge* case cited by respondent, the court held:

"An injury arises out of the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation as a

result of the exposure occasioned by the nature of the employment, then it arises out of the employment."

(*Vincennes Bridge Company vs. Ind. Com.*, 351, Ill. 411.)

In the *Union Starch Company* case, also cited by respondent, the court held:

"That an accident to be compensable must result from a risk incident to the employment, and that the employee at the time of the accident must be doing that which he is reasonably required to do within the time of his employment and at a place where he reasonably may be expected to be while discharging the duties of his employment."

The court there further said,

"Whether the exact hour of seven o'clock (when employee's work began) had arrived or whether it was a few minutes either before or after seven is not material so long as a substantial and reasonable compliance with the employer's requirements is shown."

(*Union Starch Co. vs. Ind. Com.*, 344 Ill. 77.)

In another case a prospective employee of a railroad had received transportation on Friday, and on that day traveled on one of respondent's trains from Decatur, Illinois to a railroad siding near Monticello, where a bunk-car had been placed for the use of employees as living quarters. A few minutes after arrival this individual was struck by a train and killed. He had performed no duties and had no duties to perform until the next day, and he was not to begin work until the next day. The Court held that he was not in the employ of respondent at the time of the accident, and that his death did not arise out of and in the course of his employment.

(*B. D. & C. R. R. Co. vs. Ind. Board*, 276 Ill., 239.)

The facts recited in the foregoing case distinguish it from the case at bar.

In *Muetler Construction Company vs. Ind. Board*, 283 Ill. 118, the foreman of a construction crew, in order to properly perform his duties was in the custom of arriving at the building where the construction work was being done from twenty to thirty minutes before the other workmen, in order to look over the ground work, make preparation for the day's labor and to order materials. He was paid by the hour from 8 to 12 and from 1 to 5, and received no extra pay for reporting in advance of the other men. No telephone had been installed where the work was in progress, and during the three or four months they had been at work on the building in question he had used some telephone in the vicinity when the necessity of ordering material arose. On the day of the accident he arrived at the building about 7:30 a. m. He opened the doors in the basement where the tools were kept, and then started to go to a telephone in order to 'phone a Lumber Company for material necessary in the day's work. He went a block north and started to cross the street when he was struck by an automobile and severely injured. In denying liability the defendant contended, first, that the period of employment had not commenced at the time of the accident, and therefore such accident did not occur in the course of his employment; second, that the injury received in crossing a public street was not arising out of his employment, but arose from a hazard common to all

people who use the public streets. In considering these contentions the Court said:

"The words 'arising out of' refer to the origin or cause of the accident and are descriptive of its character, while the words 'in the course of' refer to the time, place and circumstances under which the accident takes place * * * as a part of defendant's duties he was required to order materials as needed, and it may fairly be said, as an incident to such employment, that he would have occasion to use, and did use, a telephone. As none was provided, he would go to some nearby place as occasion required. In going to and returning from such place we think he was as much in the course of his employment as he would have been in going to and returning from a telephone if one had been installed on the premises * * * he was on his way to telephone about a matter which was a part of his employer's business in the usual course of his employment. Under these facts there can be no serious question but that the accident occurred in the course of the employment. That it occurred before the actual time for the commencement of work is not controlling. Too great stress cannot be placed on the exact time when the earning of wages commenced and ended, but a reasonable time must be allowed before and after such time and included within such period of employment where the employee is at a place where he might reasonably be expected to be at such time and is injured in the course of the duties of his employment. What would be a reasonable time in such case must to a large extent depend upon the particular facts and circumstances of each case."

In *Munn vs. Ind. Board*, 274 Ill. 70, the Court held:

"An injury sustained by an employee an hour after his usual quitting time, by inhaling gas while attempting to put out a fire in the coal in and about the boiler and engine room on the employer's premises, arose out of and occurred in the course of his employment."

We believe the *Mueller* case is applicable to the present case upon the question of the time of the accident. In the former case the employee was injured about thirty minutes before his work for the day was to begin, and in the present case claimant was injured about forty minutes after his actual mowing operations on the highway ceased. During those forty minutes claimant had been continuously engaged in removing from the scene of his actual labors the mowing machine and team necessarily used by him in such work. Whether the accident arose out of the employment or from any special risk or hazard peculiar to it or incidentally connected therewith, is a further question. Again quoting the *Mueller* case (supra p. 155) we read, that "a risk is said to be incidental to the employment when it belongs to or is connected with what a workman has to do in fulfilling his contract of service." It is difficult to reconcile the decisions in cases where employees have been injured while in public

places but the gist of the decisions seem to be that there must be some special risk incident to the particular employment which imposes a greater danger upon the employee than upon other persons using the streets. The test however seems not to be that other persons are exposed to the same danger, but rather that the employment renders the workman peculiarly subject to the danger, that is did the circumstances of the employment require the employee to incur some special risk in using the highway? It was necessary in order to mow the grass and weeds along Highway No. 52 that the team and mover be brought to that location, and that they be removed after such work was finished. The removal of same was a natural incident of the work, and the injury suffered by claimant by being run into on the highway while so removing his machinery and team resulted from a risk incident to the employment, and the employee at the time of the accident was doing that which he was reasonably required to do within the time of his employment and at a place where he reasonably might be expected to be while discharging the duties of his employment, and the facts herein apparently come within the rule of the *Union Starch Company* case (supra) as hereinabove stated. It was a part of claimant's duties to drive the mower to the point where the grass and weeds required cutting, and to remove it from the scene of such operations when the work was finished. Again considering the rule as stated in the *Vincennes Bridge Company* case (supra,) we believe that "upon consideration of all the circumstances a causal connection is apparent between the conditions under which claimant's work was required to be performed and the resulting injury; that the injury can be seen to have followed as a natural incident of the work and could have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment," i. e., the moving of machinery and equipment over the highways to and from the place of work. We therefore find that the injuries to claimant arose not only in the course of, "but out of his employment," and that he is entitled to compensation under the terms of the Workmen's Compensation Act. An award is therefore hereby made in favor of claimant Peter J. Frieders, for temporary total disability for twenty-six and three-sevenths ($26 \frac{3}{7}$) weeks from October 10, 1934 to April 15, 1935, in the sum of Three Hundred Seventy (\$370.00)

Dollars, and for twenty-five (25) per cent permanent partial specific loss of use of the left leg, in the sum of Six Hundred Sixty-five (\$665.00) Dollars, making total compensation of One Thousand Thirty-five (\$1,035.00) Dollars, and the further sum of One Hundred Three (\$103.00) Dollars payable to claimant for the use of Dr. W. H. Schwingel, and the further sum of One Hundred Twenty-nine and 90/100 (\$129.90) Dollars to claimant for the use of St. Charles Hospital, making a total award of One Thousand Two Hundred Sixty-seven and 90/100 (\$1,267.90) Dollars.

On the basis of Fourteen (\$14.00) Dollars per week minimum payments, the total amount of such award has heretofore been earned, and claimant is therefore entitled to payment thereof in full at this time.

This award being subject to the provisions of an Act entitled, "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," Approved July 3, 1937 (Sess. Laws 1937, p. 83), and being, by the terms of such Act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from said appropriation from the Road Fund in the manner provided for in such Act.

(No. 3045—Claim denied.)

DENNIS BROTHERS CO., Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed December 15, 1937.

Claimant, pro se.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

PLEADING—rules of court—when failure to comply with justifies dismissal of claim. When claim is not sworn to, fails to comply with other rules of court, contains no bill of particulars and fails to inform court as to any particulars in regard to law under which claim for refund is sought, it is fatally defective and must be dismissed.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein seeks a refund for a truck license paid December 6, 1935 for Twenty-four (\$24.00) Dollars; their contention being that the law under which such license fee

was collected "was not enforced and that therefore they are entitled to a refund for the amount paid." The claim is not sworn to as required by Rule 2 (a); it fails to comply with Rule 5 (a) and Rule 5 (b), and contains no bill of particulars as provided by Rule 6 (a), of the Court of Claims.

Neither does it inform the court as to any particulars in regard to the law under which the refund is sought to be obtained.

It appears however, from the statement of the Attorney General, filed in support of the latter's motion to dismiss the complaint, that the Motor Vehicle Act of July 9, 1935 which was in force at the time claimant applied for a license, provided as part of Paragraph 21, Section 20, Chapter 95 (a), Motor Vehicle Law, Ill. State Bar Statutes, 1935 as follows:

"If, under the laws of such city, state, foreign country or province, territory or Federal district, motor vehicles or motor bicycles owned by residents of this State, operating upon the highways of such city, state, foreign country or province territory or Federal district, are required to pay the registration fee and carry the license plates or pay any other fee or tax to such city, state, foreign country or province, territory or Federal district, the motor vehicles or motor bicycles owned by residents of such city, state, foreign country or province, territory or Federal district, and operating upon the highways of this State shall comply with the provisions of sections 8, 9, 9b, 9c, 9d, 9e, 9f, 9g, 9h, 9i, 9j, 9k, 10, 14, 17 and 27 of this Act."

Paragraph 9 of the Act provided in part that the applicant "shall pay to the Secretary of State for each calendar year from and after January 1, 1936 for the use of the public highways of this State, a license fee of Five (\$5.00) Dollars for each such vehicle," and such section also contained the following, "Vehicles having a gross weight of more than eight thousand (8,000) pounds and not more than ten thousand (10,000) pounds, including the weight of the vehicle and maximum load—\$19.00."

Claimant's truck, as shown by the license No. C-623, was licensed under these provisions.

Prior to March 30, 1936 no reciprocal agreement had been entered into between the State of Illinois and the State of Iowa, and no such agreement being in effect, the license fee in question was due and payable, and was in fact paid by him voluntarily and without protest. The fact that after March 30, 1936 a reciprocal agreement was entered into and that Illinois fees were not thereafter required, could not entitle claimant to a refund.

Not only, therefore, because of the fact that the claim is not presented in proper form but because under all the facts apparent, no refund would be allowed. The motion of respondent to dismiss the claim is granted and the claim is hereby dismissed.

(No. 3128—Claimant awarded \$58.33.)

VERA NORDSTRAND, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed December 15, 1937.

FREDERICK R. NYBERG, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

ILLINOIS LIQUOR CONTROL LAW—duplicate payment of license fee under—when award for refund may be made. Where it appears that licensee paid a fee twice for the issuance of the same license, due to two applications being made for same license and no action is taken on second application, except issuance of receipt for money, the result is the same, insofar as second application is concerned as if a denial of license had been made and an award for the refund of amount paid on second application may be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks an award of Fifty-eight and 33/100 (\$58.33) Dollars, alleging that on May 1, 1936 her agent paid that sum to the Illinois Liquor Control Commission for the issuance of a license, to retail alcoholic liquors at a restaurant then owned and operated by her and known as "A Bit of Sweden," at 1011 Rush Street, Chicago, Illinois; such license being apparently for the fourteen (14) months' license period of 1936-1937. Upon payment of such sum claimant's agent was given a receipt by the commission, numbered 13,010, showing that the commission had received of Mrs. Vera Nordstrand (A Bit of Sweden), of 1011 Rush Street, Chicago, Illinois, the sum of Fifty-eight and 33/100 (\$58.33) Dollars.

The complaint further recites that subsequently, on May 26, 1936, claimant not knowing of the action by her agent in paying the deposit of license fee aforesaid, made a further payment of Fifty-eight and 33/100 (\$58.33) Dollars to the Illinois Liquor Control Commission for a state license as retailer of alcoholic liquors for the address in question, and upon payment of such sum by her, was given a receipt by the commission, numbered 19,242, and which recited that the commission had received from Mrs. Vera Nordstrand (A Bit of Sweden), the sum of Fifty-eight and 33/100 (\$58.33) Dollars

as a deposit of license fee for the address in question at 1011 Rush Street, Chicago.

Claimant sought a refund from the Illinois Liquor Control Commission which was refused on June 7, 1937, and the claim was herein filed on October 4, 1937, seeking a refund for the money paid by claimant to the State for a license, for which she had already through her agent previously paid.

It is the opinion of the court that it was the intention of the legislature when it passed the Liquor Control Act for Illinois, that those desiring to engage in the sale of such liquors should pay a license fee therefor, but it was certainly not the intention of the legislature then, nor is it the interpretation of the court of decisions cited by respondent that the State should be paid twice for the issuance of a license for the privilege of engaging in such business. Except for the numbers noted on the two receipts in question, and the variance of dates (one being May 1, 1936 and the other May 26, 1936), the two receipts are exact duplicates.

A license for the location in question was duly issued on the first application, and as no action was apparently taken upon the second or duplicate application, except the issuance of a receipt for the money paid, the results so far as such second application are concerned are the same as if a denial of license had been made thereon.

Paragraph 146, Chapter 43, Ill. Rev. Statutes, 1937 provides in part as follows:

"All applications—shall be accompanied by the deposit of the full amount of the license fee to be paid for the kind of license applied for, which fee shall be returned to such applicant if such application is denied."

There is nothing in the law that contemplates or justifies payment being made twice for the license in question, and claimant is apparently entitled to a refund.

The motion to dismiss the complaint is denied, and as no further question of fact appears to be involved, an award is hereby entered in favor of claimant, Vera Nordstrand, for the sum of \$58.33.

(No. 3104—Claimant awarded \$3,968.00.)

BERTHA S. ERRION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed December 15, 1937.

CHARLES G. DICKMAN and LONDON MIDDLETON, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—death resulting from injuries in accident under evidence that injuries alone would not have caused—when does not bar award. Where an employee receives serious injuries, consisting of a fracture of the right pelvic bone, the right collar bone and internal injuries and dies before his injuries heal, an award for compensation may be justified, even though there is medical testimony that the injuries alone would not have produced death, where the record is silent as to employee being afflicted with any ailment that might have contributed to his death.

SAME—when award made under. Where it appears that employee of State sustains accidental injuries, resulting in his death, arising out of and in the course of his employment, while engaged in extra hazardous employment, an award for compensation may be made to those entitled, in accordance with the provisions of the Act, upon compliance with the terms thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

As no conflict of facts could apparently exist in this cause a stipulation has been entered into between claimant and respondent, wherein it appears that Oscar Errion had been employed by the State of Illinois from December 21, 1935 up to the time of his death as a laborer in the Division of Highways; that during the period from January 29, 1936 to January 29, 1937 he was steadily employed and received as total wages, the sum of Nine Hundred Ninety-two (\$992.00, Dollars; that on the latter date he was working with a maintenance crew repairing the highway known as U. S. Route No. 24 in the Village of Bartonville, Illinois; that while working inside of the barricades adjacent to one-way traffic and while engaged in applying a patent asphalt patch to the pavement, the flames therefrom flared up and as deceased stepped backwards he slipped and fell beneath a hot asphalt kettle trailer, which was being pulled by another state truck along the one-way traffic lane. The dual wheels of the trailer passed over his body from the right knee upward and over the right shoulder. The injured employee was removed to his home and from there to the St. Francis Hospital at Peoria, where he remained until he died on February 22, 1937. Dr. Trewyn, in making a formal report of the patient's condition, stated, "Nature of injury, 'comminuted fracture right Clavicle with large hematoma fracture, right Clavicle, with large hematoma fracture, right Ischium—Cerebral Emboli, 2/8/37, from which patient did not recover. Died, February 22, 1937.' "

Respondent paid all hospital and doctor bills amounting to Five Hundred Twenty-one and 36/100 (\$521.36) Dollars.

The deceased employee was married but had no children under the age of sixteen years at the time of his death. If an award is due it is conceded that under Section 7 (a) of the Workmen's Compensation Act the amount would be a sum equal to four times the average annual earnings of the employee, but not less in any event than Two Thousand Five Hundred (\$2,500.00) Dollars, and not more in any event than Four Thousand (\$4,000.00) Dollars, which in this case would entitle her to Three Thousand Nine Hundred Sixty-eight (\$3,968.00) Dollars.

As the claim was filed on June 1, 1937, being within six months of the date of the accident, the only question that is presented by the record is, did deceased's death result from such accident? The medical report, referred to in the stipulation, shows that ten days after the accident of January 29th, Oscar Errion had a Cerebral Emboli, from which he did not recover. Such report also shows the various fractures and injuries which at the time necessitated his presence in the hospital, and it further shows that he died February 22, 1937. The record discloses that the wheels of the truck crushed and fractured the employee's right pelvic bone, his right collar bone and that he suffered internal injuries. Nothing appears in the record to indicate in any way that the injured employee was suffering from any other ailment or physical condition that might have contributed to his death, and medical experience has shown conclusively that Emboli frequently results in the case of a fracture and consequent injury to the circulatory system. There is no doubt in the court's mind that claimant is entitled to an award, under the terms of the Workmen's Compensation Act. Such conclusion is supported by the ruling in the *Lunighi Coal Co. case*, wherein the court held:

"Where an employee receives injuries to his chest, fractures a rib and the sternum, soon develops pneumonia and dies before his injuries heal, an award in favor of the dependents for the full amount allowed by statute is proper, although the attending physicians testify that the injuries alone would not have produced death." *The Lunighi Coal Co. vs. Industrial Commission*, 305 Ill. 476.

Claimant, Bertha S. Errion, is the surviving wife of said Oscar Errion. An award is hereby made in her favor for a sum equal to four times the average annual earnings of said

Oscar Errion or Three Thousand Nine Hundred Sixty-eight (\$3,968.00) Dollars, being four times the average annual earnings which the injured employee received as wages during the year next preceding his injury, as provided under Section 7 (a) of the Workmen's Compensation Act. On the basis of his annual earnings, claimant's average weekly wage amounted to Nineteen and 07/100 (\$19.07) Dollars, and payments of Fifty (50) Per Cent thereof would entitle the recipient to the sum of Nine and 53/100 (\$9.53) Dollars per week. The amount of Four Hundred Thirty-eight and 38/100 (\$438.38) Dollars has accrued as earned compensation for forty-six (46) weeks from the date of the injury to the 17th day of December, A. D. 1937, and claimant is therefore entitled to payment at this time in the sum of Four Hundred Thirty-eight and 38/100 (\$438.38) Dollars with future monthly payments to be made to her on the basis of Nine and 53/100 (\$9.53) Dollars per week for three hundred seventy (370) weeks until the further sum of Three Thousand Five Hundred Twenty-six and 10/100 Dollars has been paid to her, with an additional final payment of Three and 52/100 (\$3.52) Dollars, making a total of Three Thousand Nine Hundred Sixty-eight (\$3,968.00) Dollars for which an award is hereby entered in favor of claimant, Bertha S. Errion; such future payments being subject to the terms of the Workmen's Compensation Act of Illinois, jurisdiction of this cause is hereby retained for the purpose of making such further orders as may from time to time be necessary herein.

This award being subject to the provisions of an Act entitled "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," Approved July 3, 1937 (Sess. Laws 1937, p. 83) and being, by the terms of such Act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from said appropriation from the Road Fund in the manner provided for in such Act.

(No. 3041—Claimant awarded \$5,000.00.)

ANDREW BUBATZ ET AL., Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed December 15, 1937.

BUTZ, HUTCHINSON, NUTT & MURPHY, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

ILLINOIS NATIONAL GUARD—disease incurred by member of, in line of duty, resulting in death—when award for compensation made be made for. Where it clearly appears that member of Illinois National Guard contracted disease, while in the performance of his duties, as such member, resulting in his death, an award may be made to his dependents, under the provisions of the Military and Naval Code.

MR. JUSTICE LANSFORD delivered the opinion of the court:

The surviving heirs of Thomas Bubatz, deceased, petition this court for an award, alleging that the death of Thomas Bubatz was a result of a disease contracted in line of duty as a member of the Illinois National Guard. The files of the office of the Adjutant General show that Thomas A. Bubatz was a private in Company E, 108th Combat Engineers and was on duty at the Second Army Maneuvers with his organization from August 8-22, 1936 at Camp Custer, Michigan. It appears that he reported at camp hospital on August 17 and complained of stomach pains and dysentery. He was examined on that date by Captain Malcom Kemper, M. C. of his regiment, who diagnosed the case as acute gastro-enteritis. He was not hospitalized but returned to duty. The report of the board on his sickness indicates the disease was incurred in line of duty. He returned to his home with his command on August 22, 1936. On August 26 he consulted Dr. R. C. Buboltz of West 43rd Street, Chicago and complained of having had dysentery with severe abdominal pains on Monday, August 24. Dr. Buboltz examined him at that time and there was no evidence of appendicitis and treated him for acute dysentery. He responded, supposedly, to the medication and felt much better on Tuesday. The doctor contemplated calling on Tuesday but the doctor's call was cancelled by Bubatz' family. On Wednesday the doctor was called again and after a careful examination he diagnosed the case as acute appendicitis. This soldier was taken to the German Deacon hospital at 54th and Logan Street, Chicago, where he was operated on and found to have an acute gangrene ruptured appendix with the abdominal cavity filled with pus. He died August 29. The doctor testified that on August 26th he took this soldier to the hospital and performed an operation. The operation disclosed the entire

gastro-intestinal tract was infected with general peritonitis; that in his opinion infective dysentery had been present for a week or more; that the dysentery had caused an acute gangrenous appendix which had ruptured. The appendix was removed but the entire abdominal cavity was filled with pus and the deceased died on August 29, 1936. The doctor further testified that in his opinion death was a result of dysentery or gastro-enteritis contracted during the encampment. The record discloses that the claimant left his father, Andrew Bubatz, his mother, Josephine Bubatz, who appears to have been entirely dependent upon him. The deceased was an employee of the International Harvester Company and earned Fifteen (\$15.00) Dollars a week. It appears from the record that he turned practically this entire sum over to his mother weekly. He was a young man about 20 years of age. From the examination of the testimony of the record, we conclude that the death of Thomas Bubatz after an operation which disclosed a ruptured gangrenous appendix, was caused by dysentery or gastro-enteritis contracted in line of duty. We have heretofore held in accordance with the following:

"Where it clearly appears that member of Illinois National Guard contracted disease while in the performance of his duties, resulting in his death, an award may be made to his dependent under the provisions of the Military and Naval Code.

Casey vs. State, 8 C. C. R. 754.

The State Court of Claims shall act on and adjust such claims as the merits of each case may demand.

Chap. 129, Art. 16, Sec. 11, Par. 143, Illinois State Bar Statutes, 1935."

After considering the age of claimants' intestate, his illness, burial expenses, etc., we are of the opinion that the father, Andrew Bubatz and mother, Josephine Bubatz were practically entirely dependent upon this deceased soldier and we recommend to the legislature an award in this case in favor of the said father and mother in the sum of Five Thousand (\$5,000.00) Dollars.

(No. 2573—Claimant awarded \$2,320.08.)

JAMES O'NEILL, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed December 15, 1937.

SIMS, STRANSKY & BREWER and T. I. McKNIGHT, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT claim for compensation under when not required within time fixed in, where employer pays injured full wages during period of disability. When an employee sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra hazardous employment, and employer has knowledge of such injury and pays employee full wages during period of disability, arising from such injury and makes no denial of liability under Act, employee is justified in regarding such payments as being made under Act, and is not bound to make demand for further compensation thereunder as long as such payments are continued.

SAME—when award may be made for partial permanent disability. Where employee within provisions of Act sustains injuries, resulting in partially incapacitating him from pursuing his usual and customary line of employment, an award may be made for sum equal to fifty per centum of the difference between the average amount earned by him before such injuries and average amount which he is able to earn in some suitable employment thereafter, for the time and in the manner provided in the Act.

MR. JUSTICE YANTIS delivered the opinion of the court:

An opinion was filed in this cause on October 17, 1935, wherein the motion of the Attorney General was allowed to dismiss the claim for failure of claimant therein to show that notice of claim had been given within six months after the accident, as required by Section 24 of the Workmen's Compensation Act. An award was denied. Thereafter, on November 16, 1935, claimant filed his Petition for Re-hearing, and alleged therein that if such re-hearing was granted claimant would be able to show that such notice of claim had been duly given to respondent. The Petition was allowed and on February 6, 1937, claimant filed a Supplemental Brief citing the then recent decision of the Supreme Court of Illinois in the case of *United Airlines vs. Ind. Comm.* 364 Ill. 346, decided on October 27, 1936, wherein the court, in considering the effect of the payment of full wages upon claimant's limitation of time for giving of notice of claim, said:

"When the employer has knowledge of the injury and does not deny liability, the employee has a right to regard the payments as having been made under the Act and is not bound to make demand for further compensation as long as the payments are continued. * * * The mere fact that the company has adopted a policy of paying its employees when they are unable to work, and does so, is not sufficient to bar the right of the employee to claim compensation when the employer ceases to make further payments. Any other doctrine would be in contravention of the purpose and the spirit of the Compensation Act."

Supplemental evidence was filed herein on November 12, 1937, showing claimant's present restricted earning capacity, and on November 15, 1937 claimant filed a further additional brief, again citing the United Airlines case (*supra*).

Contrary to the allegations in claimant's Petition for Re-hearing, he did not upon the taking of additional evidence after such petition was granted, produce any evidence to show that notice had in fact been given by claimant to respondent of his intention to make claim for compensation for the accident in question, and the record now stands in that respect the same as it did when the original opinion was filed herein on October 17, 1935.

The decision in the United Airlines case was not handed down by the Supreme Court of Illinois for more than a year after the opinion of this court in the case at bar. Under that decision and under *Field and Company vs. Ind. Comm.* 305 Ill. 134, the rule is announced that where an employer makes payments to an injured employee during a period of time when the employee is unable to work, and liability under the compensation Act is not denied, such payments will be construed to have been made in consequence of the employer's liability; further, that when the employer has knowledge of the injury, and does not deny liability, the employee has the right to regard the payments as having been made under the Act and is not bound to make demand for further compensation as long as the payments are continued. While this seems a broad construction to give to the wording of Section 24 of the compensation Act, such has been the ruling in regard to cases of industrial employment, and we feel impelled to follow such construction. Payment of wages were made to claimant until the time he was discharged on September 10, 1934. His claim was filed with the clerk of this court on January 9, 1935, and we therefore find that the court has jurisdiction of the subject matter and the parties hereto.

We further find that claimant on January 11, 1934, was an employee of the State of Illinois, and at the time of the accident in question was a highway policeman, employed by the State Highway Department; that on said date while in the course of his regular employment the automobile which he was driving was struck at the intersection of Western Avenue and Roosevelt Road in Chicago by a southbound automobile, driven by one Steve Pietrzyk who, in disregard of

the signal light, crashed into the car driven by claimant, causing serious bodily injuries to the latter; that he was confined to the hospital for nine (9) days, and as a direct result of the injuries suffered in said accident, received a permanent injury to his vocal cords and has since been unable to speak above a whisper, that such accident arose out of and in the course of his employment; that his wages at the time of said accident were Two Hundred Ten (\$210.00) Dollars per month; that he suffered temporary total disability from January 11, 1934 to March 1, 1934; that he continued to receive his full wages until he was discharged on September 10, 1934. So far as the record discloses claimant is married but has no children. He has been employed at different occupations since being discharged by the State, having worked as a messenger in the City Hall at Joliet, at One Hundred Twenty Five (\$125.00) Dollars per month, and as a farm hand, at One Hundred (\$100.00) Dollars per month. The basis for his claim at this time is a permanent paralysis to his vocal cords which prevents him from being able to speak above a whisper and which prevents him from obtaining certain employments which he held prior to his employment by the State, such as serving as an umpire in various baseball leagues, and as a railroad employee; his failure to obtain such jobs being attributed by him to his inability to speak above a whisper. In answer to a direct question (Transcript p. 9) of, "Whether his discharge was due to his physical condition or whether politics was responsible," claimant stated, "That he always thought his discharge was due to politics." However that may be, the record now discloses that claimant has a permanent partial disability, i. e., a throat injury, resulting from the accident in question and causing him to be unable to pursue his usual and customary lines of employment. A report, filed by Dr. Charles J. Carlin and by Dr. R. W. Lennon of the New Prison Hospital at Joliet, states that claimant is suffering from "Paresis of the vocal cords,—is unable to speak above a whisper and in their opinion such condition is traced to the accident in question." Claimant's wages at the time of his injury were Two Hundred Ten (\$210.00) Dollars per month. The best wage which he has been able to obtain since his discharge by the State, was a messenger at One Hundred Twenty-five (\$125.00) Dollars per month, which job he voluntarily resigned.

Section 8 (d) of the Act provides:

"If after the injury, etc., the employee as a result thereof becomes partially incapacitated, etc., shall etc. receive compensation, subject to limitations as to time and maximum amounts fixed in paragraphs (b) and (h) of said section, equal to fifty per centum of the difference between the average amount which he earned before the accident and the average amount which * * * he is able to earn in some suitable employment or business after the accident."

From the foregoing we find the difference between the average amount claimant earned before the accident and that which he is able to now earn is \$1,020.00 per year. Fifty per cent thereof or \$510.00 is the equivalent of \$9.80 per week, or the weekly compensation to which claimant is entitled under the provisions of Section 8 (d) for permanent partial disability.

Claimant is entitled to compensation for temporary total disability of \$15.00 per week from January 11, 1934 to March 1, 1934, or \$105.00.

He is also entitled to compensation for permanent partial disability from March 1, 1934 for a period not to exceed eight (8) years at \$9.80 per week, subject to the limitation of Section 8 (d).

Claimant has heretofore been paid at the rate of \$210.00 per month from January 11, 1934 to September 10, 1934, being the equivalent of \$48.46 per week for a period of thirty-four (34) weeks and four (4) days, or \$1,679.92.

Figured to the most convenient current date, the compensation due him is as follows:

| | |
|---|------------|
| From January 11, 1934 to March 1, 1934, @ \$15.00 per week..... | \$ 105.00 |
| From March 1, 1934 to September 10, 1934 @ \$9.80 per week..... | 271.12 |
| From September 10, 1934 to December 9, 1937 @ \$9.80 per week.... | 1,651.29 |
| | <hr/> |
| | \$2,027.41 |
| Heretofore paid | 1,679.92 |

Balance earned and due to December 9, 1937.....\$ 347.49
such latter sum being payable instanter, and monthly payments thereafter being due at the rate of \$9.80 per week for a further period of two hundred and one weeks; and a final payment thereafter of Two Dollars and Seventy-nine Cents (\$2.79), the total of such deferred payments being \$1,972.59.

The motion of the Attorney General to dismiss the complaint is now denied and an award is hereby entered in favor

of Claimant James O'Neill for the sum of Three Hundred Forty Seven and 49/100 (\$347.49) Dollars, payable instant, and monthly payments thereafter at the rate of Nine and 80/100 (\$9.80) Dollars per week for a further period of Two Hundred and One (201) weeks; and a final payment of Two and 79/100 (\$2.79) Dollars; the total of such deferred payments being \$1,972.59, and such deferred payments being made subject to the further order of this court, for which jurisdiction of this cause is hereby retained.

This award being subject to the provisions of an Act entitled, "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," approved July 3, 1937 (Sess. Laws 1937, p. 83) and being, by the terms of such Act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from said appropriation from the Road Fund in the manner provided for in such Act.

(No. 3106—Claim denied.)

IRENE EMLING, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed December 15, 1937.

LEVIN, FRANK & RABICHOW, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

SALARY—*claim for additional, during vacation period, not awarded of—when denied.* Employee of Illinois Emergency Relief Commission is not entitled to salary for services rendered during period, when it is alleged she was entitled to and should have been on leave of absence, where she was paid for such services.

CIVIL ADMINISTRATIVE CODE—*Section 22 of—not applicable to employees of Illinois Emergency Relief Commission.* Section 22 of Civil Administrative Code, providing that each employee of the several State departments shall be entitled during each calendar year to fourteen days leave of absence, with full pay does not apply to employees of Illinois Emergency Relief Commission.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant is a former employee of the Illinois Emergency Relief Commission. She files this claim "on behalf of herself and on behalf of all other persons who may at any time hereafter desire to become parties hereto." Claimant alleges that

she was in the employ of the commission from May 1, 1935 to April 30, 1936; that she was entitled to two weeks vacation with pay as such employee; that she did not receive such vacation and therefore seeks an award for a sum equal to two weeks' salary.

The Attorney General has filed a motion to dismiss the complaint.

Claimant's petition recites that proceedings in mandamus were instituted in the Superior Court of Cook County in behalf of claimant and others, on October 26, 1936, asking for a writ to be directed against the Illinois Emergency Relief Commissioners to pay the vacation salaries due claimant and others; that such proceedings were dismissed by the Superior Court. The Attorney General contends that this court should not now take jurisdiction, for the reason that in so doing it would be in effect reviewing the action of the Superior Court of Cook County, and that claimant should have proceeded with her action there if she desired to receive further consideration. Claimant, in her answer to the motion to dismiss, represents that the decision of the Superior Court was not on the merits of the claim, but "rather on a motion to dismiss, predicated mainly upon the ground that mandamus was not a proper remedy to enforce the rights of claimant." If claimant had a right to a vacation period which was being denied, such right could have been enforced by mandamus, and this court will not review the action of the Superior Court in refusing to grant such right.

Similar demands to that here presented have recently been before the court, and awards therein denied. (See *Stephen O. Tripp vs. C. of C.*, No. 2248.)

Claimant places her demand upon Rule 7 of the Civil Service Commission, effective June 9, 1934, Sub-section 3 of Section 4, wherein it is provided:

"That all employees may be granted not to exceed two weeks' vacation with pay during any one year."

The Attorney General contends that Section 22 of the Civil Administrative Code has no application to employees of the Illinois Emergency Relief Commission; such Section (Ch. 24 (a), Ill. State Bar Statutes, 1935) providing as follows:

"Each employee in the several departments shall be entitled, during each calendar year, to fourteen days' leave of absence with full pay."

Further, that in Paragraph 2 of the same Act it is provided:

"That the word 'department' as used in this Act shall, unless the context otherwise clearly indicates, mean the several departments of the State government as designated in Section 3 of this Act, and none other."

The Illinois Emergency Relief Commission is not designated in Section 3 of such Act, and in our opinion is not otherwise indicated by the context thereof. Nowhere in the Act creating such commission (Paragraphs 463-4-5, Ch. 23, State Bar Statutes, 1935) is there any provision which authorizes the employees of such commission to receive pay in lieu of vacation periods.

Claimant further contends that the Act creating the Illinois Emergency Relief Commission authorizes the officers to promulgate such rules and regulations as in their discretion deemed proper or advisable for the efficient administration of their department, (Section 1, Par. 463, Ch. 23, Cahill's Ill. Revised Statutes, 1935). Further, that acting under such authority, the commission, on May 26, 1935 issued Bulletin No. 2327 as follows:

"Vacations for employees have been authorized as follows: The vacation period will extend from May 1, 1935, to October 31, 1935. Employees who have been in the continuous employ of the Commission for a period of six months prior to May 1, 1935, will be entitled to one week's vacation with pay, and if desired, one additional week without pay. In determining qualifications for vacations, the following rules shall apply:

(a) Qualifications for vacation depend upon continuous service.

Conceding for the moment, that the commission had authority to give vacations with pay, under authority of the foregoing statute and rule, claimant would still not be entitled to double pay for any portion of time for which she was actually in service, or entitled to any additional pay after her services to the State were terminated, even though she had failed to obtain a vacation which she might have requested. Attention is further called to the fact that in the wording of Section 1 above quoted, the commission is referred to as a distinct department. Such department is not included under the provisions of Section 22 of the Civil Administrative Code, Chapter 24 (a), State Bar Statutes, 1935.

The averment set forth in plaintiff's claim and in the amendment filed thereto, on July 6, 1937, are not sufficient upon which to predicate an award. The motion of the Attorney General to dismiss is allowed and an award denied.

(No. 2141—Claim denied.)

BUSINESS MEN'S ASSURANCE COMPANY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed December 15, 1937.

EVAN HOWELL, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ AND JOHN KASSERMAN, Assistant Attorneys General, for respondent.

LICENSE FEE—paid through negligence or inadvertence—not under mistake of fact—is voluntary payment—cannot be recovered. Where an illegal or excessive tax is paid with a full knowledge of all the facts, or means of obtaining such knowledge, such payment is a voluntary one, not made under mistake of fact, and cannot be recovered.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant is a Missouri corporation licensed to do business in Illinois, under the provisions of "AN ACT TO ORGANIZE AND REGULATE THE BUSINESS OF LIFE INSURANCE, Approved March 26, 1869." Section 23 of such Act provides that the Superintendent of Insurance shall be paid Two (\$2.00) Dollars for each Certificate of Authority; that another Insurance Law, i. e. "AN ACT CONCERNING THE BUSINESS OF CASUALTY INSURANCE, Approved April 22, 1899," in Section 15 thereof prohibits the solicitation of business by an agent for any casualty company without first procuring from the Superintendent of Insurance, a Certificate of Authority, and without first paying a fee of Two (\$2.00) Dollars for each such certificate.

Prior to July 13, 1932 the Superintendent of Insurance of Illinois required that companies licensed to write insurance business in Illinois, should procure separate licenses under the two foregoing statutes. On July 13, 1932 Hon. Oscar E. Carlstrom, Attorney General of the State of Illinois, issued an opinion in which he announced in substance that agents of Life Insurance Companies operating under the provisions of the Act of 1869, and whose companies had also availed themselves of the provisions of the Act of 1919 to write accident and health insurance, should be permitted to write both lines of business by the issuance of *one* certificate to such agents and the payment of only one fee for each to the Insurance Department.

Claimant had voluntarily paid separate license fees under the two statutes for the years intervening between the dates of April 27, 1920 to July 13, 1932, amounting to the sum of Seven Hundred Sixty-six (\$766.00) Dollars, for which claimant now seeks an award. The Attorney General filed a motion to dismiss the complaint. A stipulation of the above facts has been filed and the motion is considered with the stipulation.

This case falls within that group wherein claims have been denied because the payment had been made under a mistake of law or because of the unconstitutionality of the law under which such payments were made.

"Taxes voluntarily paid cannot be recovered unless there is a statute authorizing such recovery. The fact that the law under which such tax was levied and paid is declared unconstitutional does not authorize the court to make an award for the recovery of same."

Wm. Wrigley, Jr., Co. vs. State, 7 C. C. R. 153.

Marx & Hass Clo. Co. vs. State, 7 C. C. R. 139.

The motion of the Attorney General to dismiss is allowed; award denied and claim dismissed.

(Nos. 2005-2006, Consolidated—Claims denied.)

D. H. BLUE, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed December 15, 1937.

M. D. MORAHN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General for respondent.

ILLINOIS WATERWAY—*damages to property, by reason of construction or maintenance of—how determined and fixed—how paid.* Under the provisions of the Act known as the Illinois Waterway Act, all claims for damages to property, by reason of the construction, maintenance or operation of the Illinois Waterway, shall be ascertained, determined and fixed by the Department of Public Works and Buildings and paid out of any moneys, which shall from time to time be provided for the payment of such claims.

SAME—*same—Court of Claims without jurisdiction in claim for.* In view of the plain provisions of the Illinois Waterway Act (paragraphs 113 and 114, chapter 19 of Cahill's Illinois Statutes), the Court of Claims is without jurisdiction to entertain claim for damages to crops, caused by overflow of water, alleged to have been caused by negligence of agents and servants of State in construction and maintenance of Illinois Deep Waterway under provisions of said Act, as there is no provision in said Act authorizing Court of Claims to take jurisdiction in claims arising in connection with Illinois waterway, except as to employees who might be injured while working on same.

MR. JUSTICE YANTIS delivered the opinion of the court:

The above entitled cause now again comes before the court upon a rehearing heretofore granted, following the rendition of the original opinion at the May, 1934 term. An award is sought for damages for overflow of farm lands in the possession of claimant as tenant, which is alleged to have occurred on or about March 15, 1928 and on or about July 4, 1928. In Claim No. 2005 claimant sought an award of three thousand four hundred thirty (\$3,430.00) dollars, and in Claim No. 2006 his damages were averred in the sum of two thousand one hundred sixty (\$2,160.00) dollars.

In both claims plaintiff alleged that the State of Illinois was the owner and in control, possession and operation of a certain improvement made upon the Illinois River at a point known as "Starved Rock Dam Site" in LaSalle County, Illinois, and that the State, through a Deep Waterway Bond Issue, began and carried on the construction of said deep waterway, together with the construction of a dam, locks, run-ways, embankments and other work necessary to carry on the building and maintaining of a deep waterway; that it was the duty of the defendant, in the construction and maintenance thereof, to build, keep and maintain the water course in that vicinity reasonably clear of any and all obstructions as they emptied into the Illinois River, so as not to cause the natural flow of waters to be obstructed, or to cause any of the creeks or other waters flowing into the Illinois River to become dammed up or the course thereof changed in such manner as to cause such waters to change their course or to overflow on the adjoining land; that the defendant disregarded its alleged duty in this respect, and that through its agents and servants failed and neglected to keep the flow of water in and upon the natural course of a creek which ran adjacent to and through the property of plaintiff, and caused same to overflow by having constructed a large embankment along the Illinois River at the point indicated, thereby causing waters to flood the lands so rented by the plaintiff, and upon which the crops, alleged to have been damaged, were then growing.

An award was denied and the claim dismissed by the former opinion of the court because of those provisions of the statutes of Illinois contained in Paragraphs 113 and 114, Chapter 19 of Cahill's Illinois Statutes in force at the time of the alleged losses.

After providing for liability upon the part of the State for damages occasioned by reason of the construction, maintenance or operation of the Illinois Waterway and its appurtenances, (*Chapter 19, Par. 113*) such statute provides as follows:

"All claims for damages to persons (except to employees) and *all claims for damages to property*, real or personal, shall be ascertained, determined and fixed by the Department of Public Works and Buildings, and paid out of any moneys which shall, from time to time, be provided for the payment of such claims."

Said section then sets forth the manner in which the arbitration and determination of such claims shall be had, and then follows the following:

"All claims for damages to persons or property shall be filed with the Department of Public Works and Buildings within five years after the injury complained of." (*Chapter 19, Paragraph 114.*)

In his petition for rehearing claimant alleged that his statement, brief and argument was not presented to the court before the rendering of the decision; that the jurisdiction which the legislature attempted to give to the Department of Public Works and Buildings to hear and determine damages is unconstitutional, does not supercede the Court of Claims Act and does not prescribe or make any provision for the payment of an award for damages which might be ascertained by the Board of Arbitration provided for therein, and that any action by such Department, under the provisions of the Illinois Waterway Act, would therefore be subject to the final jurisdiction of the Court of Claims.

In the brief filed by claimant, under date of May 4, 1934, claimant relies upon Section 13 of An Act to create the Court of Claims, etc., approved June 25, 1917, wherein it is provided that,

"The jurisdiction conferred upon the Court of Claims by this Act shall be exclusive. No appropriation shall hereafter be made by the General Assembly to pay any claims or demands over which the Court of Claims is herein given jurisdiction, unless an award therefor shall have been made by the Court of Claims."

The Illinois Waterway Act was approved June 17, 1919 (Laws 1919, p. 977). We are of the opinion that when the legislature inserted therein the provision contained in section 24 of that Act that, "All claims for damages to property, real or personal, shall be ascertained, determined and fixed by the Department of Public Works and Buildings," used

such words advisedly, and that purported damages arising through the construction or maintenance of such Illinois Waterway should first be inquired into and arbitrated under the direction of the Department of Public Works and Buildings.

In our former opinion we called attention to the fact that there is no provision in said Illinois Waterway Act authorizing the Court of Claims to take jurisdiction over claims arising in connection with such Illinois Waterway, except as to employees, who might be injured while working on same. Such statement is correct. Claimant in his petition for rehearing contends that the Court of Claims has original and exclusive jurisdiction to hear and determine damages arising out of the construction or maintenance of such waterway. We do not believe this contention to be correct. When the two Acts are considered together the legislative intent that arbitration of damage claims should first be had, is apparent. In such arbitration if damages were found to be due the claimant such damages would have been payable, under the terms of the Waterway Act (Sec. 24) "out of any moneys which shall from time to time be provided for the payment of such claims." There having been no compliance by the claimant with the provisions of the Waterway Act for arbitration of his claims and a determination of the amount thereof by the Department of Public Works and Buildings, his claims for damages are not properly before the court for consideration, because of his failure to comply with such preliminary requirements. We hold that the legislative provisions for such inquiry and determination of damages as prescribed by the Waterway Act were fully within the legislative province, and the original opinion of the court is reaffirmed and an award in the consolidated action by claimant is hereby denied.

(No. 2007—Claim denied.)

FRANK F. FOLLETT, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 8, 1934.

Rehearing granted September 15, 1937.

Opinion on rehearing filed December 15, 1937.

M. D. MORAHN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN,
Assistant Attorney General, for respondent.

The issues involved herein are the same as those in *Blue vs. State*, Nos. 2005 and 2006, ante, and the decision in that case is controlling herein.

MR. JUSTICE YANTIS delivered the opinion of the court:

The facts alleged in the complaint and the law pertaining thereto are identical with those set forth in Claims No. 2005 and No. 2006, *D. H. Blue vs. The State of Illinois*, except that the said D. H. Blue was the tenant of lands alleged to have been flooded by overflow waters, and the claimant herein, Frank F. Follett, as receiver, was the landlord and entitled as such to a portion of the rents and products of said land, as set forth in Claim No. 2005.

The Attorney General asks that his motion to dismiss in the other cases shall apply to this case, and it appearing by the recitals in said complaint that the matters therein alleged are within the provisions of the Illinois Waterway Act, this court is without jurisdiction and the motion to dismiss should be allowed. (See opinion in *D. H. Blue vs. State of Illinois*, No. 2005). Motion to dismiss allowed.

N. B. ADDITIONAL OPINION ON REHEARING.

MR. JUSTICE YANTIS delivered the opinion of the court:

This cause again comes before the court after the allowance of a petition for rehearing. As stated in the original opinion filed in the above cause at the May term, A. D. 1934, the only variance between this action and that of *D. H. Blue vs. The State Court of Claims*, No. 2005 and No. 2006 is that claimant herein was the landlord of lands involved, and D. H. Blue was the tenant thereon.

This is also true in the consideration of this cause under the rehearing heretofore granted. An opinion has heretofore been filed in the other two cases, i. e. *Blue vs. State*, No. 2005 and No. 2006 reaffirming the former opinion, and denying an award. The views expressed in those cases apply to the instant case. The motion by the Attorney General to dismiss this case is allowed and an award denied.

(No. 2760—Claimant awarded \$993.75.)

JOSEPHINE PENNIE, Claimant, vs. STATE OF ILLINOIS, Respondent:

Opinion filed January 11, 1938.

GEORGE HOLLOWAY WEBB, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

CIVIL SERVICE EMPLOYEE—illegal removal—order of reinstatement by Civil Service Commission—when award for salary for period of illegal removal may be made. An award for salary may be made to employee of State, in position classified under Civil Service Act and who was illegally removed therefrom, for time after order of reinstatement and reporting to work thereunder and actual reinstatement, even though, another performed the duties required in said position and was paid the salary therefore, where it is shown that employee filed protest against said removal with Civil Service Commission, in all respects complied with provisions of Act, that said Commission ordered her reinstatement in said position, that she was during said time, ready, able and willing to perform said duties, tendered her services therefore and that such tender was refused.

SAME—de jure officer—illegal removal—claim for salary during period of de facto officer performing services and receiving salary during—exception to rule that de jure officer cannot recover. While the general rule is that the payment in good faith of the salary of an employee, classified in a position under the Civil Service Act, who is deemed to be a de jure officer, to another, who performs the duties of such office, and is deemed a de facto officer, constitutes a bar to an action by the de jure officer for the salary paid to such de facto officer, such rule does not apply where the de jure officer is illegally removed from her office and the salary has been paid to the de facto officer, who is illegally appointed in her stead, and where the right of the de jure officer to the position has been definitely established.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

This case comes before the court on a stipulation of facts substantially as follows:

Claimant resides in the City of Chicago, and on September 19th, 1930 was certified by the Civil Service Commission to the position of senior department stenographer in the classified service of the State Athletic Association of Illinois, at a salary of \$150.00 per month. She continued in such position until March 16th, 1933, upon which date Joseph Triner, then Chairman of the State Athletic Commission of Illinois, prevented her from working and ordered her not to work, and thereafter continued to prevent her from so working, and placed one Sarah Reedy in claimant's position to do her work.

Claimant filed her protest with the State Civil Service Commission, which Commission, on August 17th, 1933, rendered its decision finding that claimant had not been legally discharged nor properly laid off, and that she ought to be continued in the same employment, and ordered the

State Athletic Commission to reinstate her in the position of senior department stenographer and pay her salary from the date of her attempted dismissal to July 1st, 1933, in accordance with the prayer of her petition.

On August 21st, 1933 claimant reported to said Joseph Triner for duty as senior department stenographer and requested that she be assigned to work. Said Triner refused to allow her to work and refused to obey the aforementioned order of the Civil Service Commission and continued in such refusal until May 16th, 1934.

On January 9th, 1934 claimant instituted mandamus proceedings in the Superior Court of Cook County to compel obedience to the aforementioned order of the Civil Service Commission, and in such proceedings presented her demand for back wages, substantially as claimed in this proceeding. Before said mandamus suit came to trial, to-wit, on May 16th, 1934, claimant was reinstated in her former position and thereupon dismissed the mandamus proceedings.

The salary of said senior department stenographer was \$150.00 per month at the time of claimant's original appointment, and continued at that amount until July 1st, 1933, on which date it was reduced to \$112.50 per month, and so remained until May 16th, 1934.

Prior to the last mentioned date the money appropriated for the salary of said senior department stenographer had been paid to other employees.

Claimant seeks an award for the wages or salary of senior department stenographer from July 1st, 1933 to and including May 15th, 1934, to-wit, ten and one-half months, at \$112.50 per month.

The Attorney General contends that claimant is not entitled to an award, and relies upon the rule laid down in the case of *The People vs. Burdett*, 283 Ill. 124, in which our Supreme Court said:

"One of the defenses interposed by appellants is that a de jure officer or employee who has been for a time wrongfully prevented from discharging the duties of his office cannot recover from the State the salary for such time when it has been paid to a de facto officer who has discharged the duties of the position during the period of time the de jure officer was prevented from discharging them. This was held to be a good defense in *People vs. Schmidt*, 281 Ill. 211, where the precise question here raised was ~~passed~~ upon and where it was held the de jure officer could not in such case recover."

In the case of *The People vs. Schmidt*, 281 Ill. 211, referred to in the *Burdett* case, the court, on page 213, said:

"The general rule is, that if the payment of the salary or other compensation to be made by the government is made in good faith to the officer de facto while he is still in possession of the office, the government cannot be compelled to pay a second time to the officer de jure when he has recovered the office,—at least where the officer de facto held the position by color of title."

The rule laid down in the *Schmidt* case and in the *Burdett* case was approved in the case of *Hittel vs. City of Chicago*, 327 Ill. 443, and in the case of *O'Connor vs. City of Chicago*, 327 Ill. 586.

In the consideration of the case now before the court, the following facts which have been stipulated must constantly be kept in mind, to-wit:

Claimant filed her protest with the State Civil Service Commission as provided by law; said commission had a hearing on said protest and rendered a decision therein on August 17th, 1933, finding that claimant had not been legally discharged nor properly laid off, and that she ought to be continued in the same employment, and ordered the State Athletic Commission to reinstate her in the position of senior department stenographer and pay her salary from the date of her attempted dismissal to July 1st, 1933; also that on August 21st, 1933 claimant reported for duty as senior department stenographer and requested that she be assigned to work, but the then Chairman of said Commission refused to allow her to work and neglected and refused to obey the order of the Civil Service Commission and continued to so neglect and refuse until May 16th, 1934.

The foregoing facts, stipulated as aforesaid, distinguish the present case from each and all of the cases heroinbefore referred to. In all of those cases the plaintiff sought to recover salary for a period of time prior to the time he was adjudged entitled to the position. In the present case, practically all of the time for which the claimant is seeking to recover salary is time which elapsed after she was adjudged entitled to the office, and after the Civil Service Commission had ordered her reinstated, and after she had reported for work and was refused permission to perform the duties of her position.

The reason for the rule laid down in the foregoing cases is set forth in the Hittel case (327 Ill.), on page 447, as follows:

"The exigencies of society require efficient performance of official duties, and to secure such performance prompt payment therefor is an essential requisite. Disbursing officers of municipalities are not clothed with judicial power to determine whether or not a person vested with the incidents of an office and performing the duties of such office is, in fact, a de jure officer *where there has been no judicial determination of such fact*. To require the public authorities to withhold the pay of an incumbent or public officer until a judicial decision, or pay the same at the peril of having to pay the same a second time, would be a source of much embarrassment and greatly tend to impair the efficiency of the public service. In the instant case, during all the time for which the compensation in question is claimed, a person other than plaintiff was the de facto chief street engineer for defendant (*People vs. Schmidt, supra*) and received the compensation for his services. Plaintiff had not at that time been adjudicated the de jure chief street engineer. Payment to such de facto employee was a good defense to this suit, and the Circuit and Appellate Courts erred in holding otherwise."

The language used by the Supreme Court in the Schmidt case, page 213, is significant. The court there said:

"The general rule is that if the payment of a salary or other compensation to be made by the government is made in good faith to the officer de facto while he is still in possession of the office, the government cannot be compelled to pay a second time to the officer de jure *when he has recovered the office*," etc.

The natural inference from the language used is that the rule there laid down is confined to the time prior to the time when the officer de jure has recovered the office.

Attention is called to the fact that in the Hittel case the court in the quotation above set forth specifically limits the reason for the rule to cases "*where there has been no judicial determination of such fact*." Also, that such court, in speaking of the right of the plaintiff in that case to recover, specifically pointed out that "plaintiff had not at that time been adjudicated the de jure chief street engineer."

The reasons set forth in the Hittel case, as the basis for the decision of the court, have no application to the present case, as to the period of time after the claimant had been adjudicated entitled to the position, and consequently the rule announced in such case cannot be held to apply in this case as to such period of time. The decision of the Civil Service Commission definitely established the right of the claimant to the position. As to the wages for the period prior to the time claimant was adjudged entitled to the office, the rule laid

down in the Schmidt case, the Hittel case, and other similar cases undoubtedly applies, but as to the time subsequent to the decision of the Civil Service Commission, such rule has no application.

The rule announced in the Schmidt, Burdett and Hittel cases must be considered in the light of the facts in such cases, and cannot be extended to cover an entirely different statement of facts.

The only case in this State which we have been able to find in which the facts are similar to the facts in the case at bar is the case of *The People vs. Thompson*, 316 Ill. 11. In that case Thompson for some time prior to September 23d, 1922 was the legally appointed and qualified second assistant fire marshal of the City of Chicago, a position classified under the Civil Service law. On the last mentioned date he was brought before the commission on certain charges preferred against him and the commission entered an order directing his discharge. Subsequent to November 1st, 1922 one Patrick Egan discharged the duties of the office and received the compensation therefor.

In certain certiorari proceedings in the Circuit Court of Cook County, the record of the Civil Service Commission discharging Thompson was "quashed and for naught esteemed," by the judgment of the Circuit Court in such proceedings, entered December 18th, 1922. On January 14th, 1923 Thompson served a written notice of the order of the Circuit Court upon the proper authorities of the City, and demanded that he be restored to his position, and that he be paid the salary appropriated for such office from December 18th, 1922, the date of the aforementioned judgment of the Circuit Court. The defendants refused to recognize Thompson as second assistant fire marshal and the defendant Egan continued to discharge the duties of the office and draw the pay therefor. In disposing of the question there involved, the court, on page 16, said:

"The rule in this State is, that the payment in good faith of the salary of an officer to a de facto officer constitutes a bar to an action by the de jure officer for the salary paid to the de facto officer. (*People vs. Schmidt*, 281 Ill. 211.) The well defined exception to the above rule is that where the relator is illegally removed from his office and the salary has been paid to another person illegally appointed in his stead a writ of mandamus will be awarded requiring the re-instatement of the relator in office and the payment of his salary during his illegal removal. (*People vs. Brady*, 262 Ill. 578;

People vs. Stenerson, 270 Id. 569; *People vs. Coflin*, *supra*). The relator in this case was clearly entitled to be paid his salary from December 18, 1922, the date of the judgment of the circuit court in the certiorari proceedings, and is entitled to the writ to compel the payment of the same."

The court recognized the general rule as laid down in the Schmidt case, but further recognized an exception thereto under the facts in the case before the court. The facts in the present case are similar to the Thompson case, and in accordance with the rule there laid down, the claimant is entitled to recover the salary of her position from the date she reported for duty, to-wit, August 21st, 1933, to May 16th, 1934.

To sustain the contention of the respondent herein would be to destroy entirely the effectiveness of the Civil Service Law. Employees in the classified Civil Service could be discharged at the whim or caprice of the officer in charge, and others placed in such positions and paid the salary therefor. If recourse were had by the ousted employee to the Civil Service Commission, and an order entered directing the reinstatement of such employee, such order could be disregarded, and the de facto appointee could be continued in office and receive the salary thereof. If the ousted employee then had resort to mandamus proceedings, and a writ was awarded, the writ could still be disregarded, the de facto appointee could be still continued in office and paid the salary thereof, and the person who had been adjudged to be legally entitled to the office would have no relief. The person refusing to obey the mandate of the court might subject himself to proceedings for contempt of court, but under the rule contended for by the respondent, the de facto employee would continue to receive the salary of the position, and the ousted employee by reason thereof would be barred from recovery. Such cannot be the law.

The views here expressed are also supported by the opinion of the Supreme Court of the United States in the case of *U. S. vs. Wickersham*, 201 U. S. 390, 50 Law Ed. 798.

Award is therefore entered in favor of the claimant for the wages or salary of her position from the time she reported to work after the aforementioned decision of the Civil Service Commission, to-wit, August 21st, 1933, to May 16th, 1934, at \$112.50 per month, to-wit, Nine Hundred Ninety-three Dollars and Seventy-five Cents (\$993.75).

(No. 3105—Claimant awarded \$146.94.)

WABASH TELEPHONE COMPANY, A CORPORATION, Claimant, vs. STATE
OF ILLINOIS, Respondent.

Opinion filed January 11, 1938.

HOPKINS, SUTTER, HALLS & DEWOLFE, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE,
Assistant Attorney General, for respondent.

*SERVICES—lapse of appropriation out of which payable, before payment
when award may be made for.* The same question presented here was be-
fore the court in the case of *Commercial Acetylene Supply Co., Inc. vs. State*,
No. 3031, *supra*, and what was said in that case is applicable herein.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of
the court:

From the stipulation of facts herein, it appears that the claimant is an Illinois corporation, and that during the years 1933, 1934 and 1935 it supplied telephone service to the Illinois Soldiers' and Sailors' Children's School at Normal, Illinois, a charitable institution maintained and operated by the State of Illinois through its Department of Public Welfare; that the respondent from time to time made payments on its account for telephone services rendered by the claimant, but between July 23d, 1933 and June 29th, 1935 there accrued an unpaid balance of \$146.94 in long distance toll charges; that said charges were for telephone services rendered in connection with the official business of said institution, and were the usual and customary charges for the services rendered; that during all of the aforementioned period claimant rendered monthly statements to said School; that at the time said services were rendered, there were sufficient funds remaining unexpended in the appropriation from which the same were properly payable, but for some reason, and without any fault or neglect on the part of the claimant, such charges were not vouchered for payment and no warrant was issued in payment thereof; and that said appropriation lapsed September 30th, 1935.

There is no question but what the services were rendered as claimed, that the charges are the usual and customary charges for such services, that monthly statements therefor were rendered to the proper office of the respondent; and that

the only reason why claimant has not heretofore been paid, is the lapse of the appropriation.

We have held in numerous cases that where services have been properly rendered to the State, and a bill therefor has been submitted within a reasonable time, but the same was not approved and vouchered for payment before the lapse of the appropriation from which it is payable, without any fault or neglect on the part of the claimant, an award for the reasonable and customary value of the services will be made, where at the time the expenses were incurred there were sufficient funds remaining unexpended in the appropriation to pay for the same. *Rock Island Sand & Gravel Co. vs. State*, 8 C. C. R. 165; *Indian Motorcycle Co. vs. State*, No. 3098, opinion filed June 11th, 1937.

Award is therefore entered in favor of the claimant for the sum of One Hundred Forty-six Dollars and Ninety-four Cents (\$146.94).

(No. 2224—Claim denied.)

CARL E. BEHR, ADMINISTRATOR OF THE ESTATE OF WALTER G. BEHR, DECEASED; HENRY BEHR AND MINNIE BEHR, CARL E. BEHR, LINCOLN A. BEHR AND CHARLOTTE BEHR BUCK, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed January 11, 1938.

KENNEDY & KENNEDY, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—gross negligence or willful and wanton misconduct of employee of State, causing—State not liable for—award for damages for on grounds of equity and good conscience cannot be made. The precise question involved herein was considered by the court in the case of *Garbutt, Adm'r. etc., vs. State*, Case No. 2246, *infra*, and what was said by the court in that case applies with equal force herein.

MR. JUSTICE LINSKOTT delivered the opinion of the court:

On June 21st, 1933 Walter G. Behr was driving his automobile in an easterly direction on S. B. I. Route No. 7, within the corporate limits of the Village of Annawan in Henry County. Said S. B. I. Route No. 7 extends in an easterly and westerly direction, and is intersected at right angles within

the corporate limits of said Village of Annawan by S. B. I. Route No. 78 which extends in a northerly and southerly direction. Said Route No. 7 is a through route and there are no stop signs or caution signs along said route near the aforementioned intersection. On said Route No. 78 there is a caution sign 350 feet south of such intersection, another caution sign 300 feet south of such intersection, and a stop sign 100 feet south of such intersection.

As said Walter G. Behr was approaching such intersection on said Route No. 7, two trucks owned by the respondent and operated by employees of its Highway Department, were approaching the said intersection from the south, on said Route No. 78, one truck being about 500 feet ahead of the other. Upon arriving at such intersection, the first truck, without stopping, turned to the right and proceeded in an easterly direction on said Route No. 7. Shortly after the first truck had so turned to the east, and while said Walter G. Behr was passing over and across such intersection, the second truck was driven into such intersection without stopping, at a speed of about forty miles per hour, and struck the automobile which the said Walter G. Behr was driving, whereby he sustained injuries from which he died on the same day, and his automobile was damaged and destroyed.

Claimant Carl E. Behr was duly appointed administrator of the estate of Walter G. Behr by the Probate Court of McLean County, Illinois and the other claimants comprise the heirs at law of said Walter G. Behr.

The complaint herein, as amended, seeks to recover damages for the pecuniary loss sustained by the claimants as the result of the death of said Walter G. Behr.

The Attorney General has moved to dismiss the case on the ground that the respondent is not liable under the doctrine of respondeat superior, for the acts of its servants and agents.

Claimants contend that the servant and agent of the respondent in charge of the truck which crashed into the Behr automobile was guilty of gross negligence, as well as wilful and wanton misconduct in the operation of said truck; that said Walter G. Behr was free from any contributory negligence, and that under such circumstances, claimants are entitled to an award.

This court has repeatedly held that in the construction and maintenance of its hard-surfaced roads, the State is engaged in a governmental function. We have also held in numerous cases that in the exercise of its governmental functions the State is not liable for the negligence of its servants and agents. *George McCready, et al vs. State*, No. 2604, decided at the September term, 1935; *Lester A. Royal vs. State*, No. 2595, decided at the September term, 1935; *Peter Tirmian vs. State*, No. 3051, decided at the May term, 1937; *Cecil W. York vs. State*, No. 2701, decided at the May term, 1937.

Claimants contend, however, that even if there is no liability on the part of the respondent for the negligence of its servants and agents, yet where such servants and agents are guilty of gross negligence or wilful and wanton misconduct, and the decedent was guilty of no contributory negligence, there is a liability on the part of the State.

This precise question was considered by this court in the case of *George Franklin Garbutt, Admr. etc. vs. State*, No. 2246, on rehearing, in which an additional opinion was filed at the September term, 1937. In that case we said:

"If the State is not liable for the ordinary negligence of its servants and agents, there is no principle of law under which it can be held liable for the gross or wanton negligence of such servants and agents, in the absence of a statute making it so liable."

Also:

"Even if it be conceded that the facts in the record do show that the servants and agents of the respondent were guilty of gross and wanton negligence, and that claimant's intestate was free from contributory negligence, still under the repeated decisions of the court the claimant is not entitled to an award. * * *"

To the same effect, see *Durkiewicz vs. State*, No. 2484, decided at the September term, 1937; *Pete Stanley, Admr. vs. State*, No. 2697, decided at the November term, 1937.

The law as above set forth is decisive of this case.

The motion of the Attorney General must therefore be sustained. Motion allowed. Case dismissed.

(No. 3034—Claimant awarded \$1,755.00.)

EDWARD KIRBY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed January 13, 1938.

R. I. DOVE, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—Injury sustained while violating orders of superiors—when right to compensation for, not barred by. Where employee sustains accidental injuries, while walking along concrete highway, in violation of the orders of superiors, requiring him to walk along side of highway, he did not, merely by such violation put himself out of the sphere of his employment, so that it could be said that he was not acting within the course of it, but he is only guilty of negligence in such violation, and a claim for compensation for such injuries is not barred thereby.

SAME—when award for compensation may be made under. Where it appears that employee of State sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra hazardous employment, an award for compensation for same may be made in accordance with the provisions of the Act, upon compliance with the terms thereof.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

For a few days prior to and on the 27th day of March, A. D. 1936, the claimant Edward Kirby was employed by the Respondent in the Department of Public Works and Buildings, Division of Highways, and on the last mentioned date was engaged in putting out trees and shrubbery along the right-of-way of S. B. I. Route No. 132, between Sullivan and Allenville, in Moultrie County.

He had finished some work on the west side of the right-of-way, and was moving to a new location farther south and on the opposite side of the highway. For that purpose he was traveling along and across the concrete slab, and was pushing or sliding a long-handled shovel along the concrete in front of him. While claimant was so engaged, one Leonard Vose was driving a truck along said highway in a northerly direction, approaching the claimant. When the truck was about a quarter of a mile from the claimant, it was being driven on the east side of the concrete roadway, and the claimant was walking in a southerly direction, just east of the center line of such roadway. As the truck approached, the claimant kept moving forward and toward the outer edge of the concrete slab. The driver of the truck pulled over to the west side of the roadway in order to pass the claimant, but just before reaching him, turned again toward the east side of the roadway. At the time of the accident hereinafter mentioned, the truck was just about astraddle of the center

line of the roadway. The several witnesses do not agree as to the exact position of the claimant at the time of the accident, but it seems that he was then about midway between the center line of the roadway and the eastern edge thereof.

Just as the body of the truck was passing the claimant he apparently lifted his shovel, and in so doing, it came in contact with the truck which was moving rapidly. The force of the impact was so great that the handle of the shovel was driven into the muscle of claimant's right arm, and his elbow, shoulder blade and collar bone were fractured. He was taken to the hospital at Mattoon where he remained approximately six weeks. He was then taken to St. Luke's Hospital at Chicago and remained therein until May 27th. After that he was given treatments at the Illinois Research Hospital at Chicago until June 22d, 1937, when he returned to his home.

While at St. Luke's Hospital he was treated and operated by Dr. Thomas of Chicago for osteomyelitis, or rotten elbow. The bad bone was removed, and an attempt made to obtain a complete ankylosis or stiff elbow;--the idea being that if the elbow were completely ankylosed, there would be more strength, though less motion, therein. The operation was successful, but the elbow is not entirely stiff, claimant having about three degrees of motion therein. He also has some limitation of motion in his right shoulder. His grip is not very good and his arm will never be as strong as it was prior to the accident. He is now working as a mechanic but cannot work as hard or as steadily as he previously did. He now works as long as he can and then lays off. In this way he loses about one-third of his working time. Apparently there is still some trouble with the elbow, as the skin has broken open and there has been a running therefrom, on three occasions since his return home. He appeared personally in court and submitted to an examination. Under the facts in the record there is no basis for a charge of negligence against the driver of the truck.

The Attorney-General contends that the injury did not arise out of and in the course of claimant's employment, and that therefore he is not entitled to an award. Such contention is based upon the following further contentions, to-wit: 1) The injury was the result of horseplay on the part of the claimant; 2) Claimant in walking along the concrete roadway was violating the orders of his immediate superior, who

ordered all employees to walk along the side of the road.

As to the first contention, there is no evidence in the record which even tends to support the same.

As to the second contention, the violation of orders by the claimant, if any, was not of such a nature as to take the claimant out of the sphere of his employment.

The question here presented has been considered by our Supreme Court in a number of cases.

In *Republic Iron Co. vs. Ind. Com.*, 302 Ill. 401, the employee was directed to take a letter to the railroad station, and to use the street car in doing so. He apparently had walked along the railroad track to the station, a distance of some fourteen blocks and was picked up, after being injured, at a place that was generally used by the public. There was also some evidence that he had been seen getting off a street car near the place of the accident. The court sustained an award of compensation, stating that the Commission might have found that he used the street car but that the decision would be the same even if he had disobeyed instructions and walked, and stated (p. 405):

"This court has many times decided that contributory negligence of a party injured is no bar to a recovery under the compensation Act. The most that may be said in favor of defendant in error's contention is, that the deceased was guilty of negligence in not obeying the orders or directions of Olson. The rule is, that where the violation of a rule or order of the employer takes the employee entirely out of the sphere of his employment and he is injured while violating such rule or order it cannot be then said that the accident arose out of the employment, and in such case no compensation can be recovered. If, however, in violating such a rule or order the employee does not put himself out of the sphere of his employment, so that it may be said he is not acting in the course of it, he is only guilty of negligence in violating such rule or order and recovery is not thereby barred. (*Union Colliery Co. vs. Ind. Com.*, 298 Ill. 561.)"

In the case of *Omaha Boarding and Supply Co. vs. Ind. Com.*, 306 Ill. 384, the deceased employee made a trip from Chicago to Barrington, Illinois, and on his return in an automobile owned by one of the officers of the company, sustained accidental injuries resulting in death. It was claimed that there were orders that he should use railroad trains in his travel. The court in sustaining an award of compensation, said (p. 389):

"The fact that he was returning in an automobile and not by railroad is of no significance, even if we should find, as defendant in error claims that the direction of the company was that he should use the railroad trains

in his travel while working at his employment. The fact that he traveled in an automobile against the direction of his employer did not take him out of the line of his employment. Violation of orders or directions of the employer by the employee does not defeat the right for compensation where such violation does not take the employee out of the sphere of his employment. *Union Colliery Co. vs. Ind. Com.*, 298 Ill. 561."

To the same effect, see *Imperial Brass Company vs. Ind. Com.*, 306 Ill. 11; *Pauline Embree vs. State*, No. 3019, decided at the November Term, 1937.

Under the facts in the record, there is no merit in this contention.

From a personal examination of the claimant, and from a consideration of the facts in the record, we find as follows:

That claimant and respondent were, on the 27th day of March, 1936, operating under the provisions of the Workmen's Compensation Act of this State; that on said day the claimant sustained accidental injuries which arose out of and in the course of his employment; that notice of the accident was given to said respondent and claim for compensation on account thereof was made within the time required by the provisions of such Act; that the average annual earnings of the claimant during the year preceding the injury in question were Six Hundred Forty Dollars (\$640.00), and the average weekly wage was Twelve Dollars and Thirty Cents (\$12.30); that claimant at the time of the injury was a married man and had two children under the age of sixteen years; that the necessary first aid, as well as all medical, surgical and hospital services have been provided by the respondent; that the claimant was temporarily totally disabled from the date of his injury as aforesaid, to November 10th, 1936, and has been paid in full for such temporary total disability; that claimant has sustained the permanent loss of sixty-five per cent of the use of his right arm; that claimant is therefore entitled to have and receive from the respondent the sum of Twelve Dollars (\$12.00) per week for One Hundred Forty-six and one-fourth (146 $\frac{1}{4}$) weeks for the permanent loss of sixty-five per cent of the use of his right arm, as provided in Section 8, paragraphs E-13 and E-17 of the Workmen's Compensation Act; that compensation for the period of sixty-one weeks, to-wit, the sum of Seven Hundred Thirty-two Dollars (\$732.00), has accrued to January 11th, 1938.

Award is therefore entered in favor of the claimant for the sum of Seventeen Hundred Fifty-five Dollars (\$1,755.00), payable as follows, to-wit:

The sum of Seven Hundred Thirty-two Dollars (\$732.00) is payable forthwith.

The balance of said award, to-wit, the sum of One Thousand Twenty-three Dollars (\$1,023.00), is payable in eighty-five (85) weekly installments of Twelve Dollars (\$12.00) each, commencing January 18th, 1938, and one final installment of Three Dollars (\$3.00).

This award being subject to the provisions of an Act entitled "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," approved July 3d, 1937 (Session Laws of 1937, page 83), is, by the terms of such Act, subject to the approval of the Governor, and upon such approval, is payable from the Road Fund, in the manner provided by such Act.

(No. 2363—Claimant awarded \$1,272.69.)

THE L. E. MYERS CO., AN ILLINOIS CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed August 18, 1937.

Rehearing denied January 13, 1938.

SPITZ & ADcock, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN and GLENN A. TREVOR, Assistant Attorneys General, for respondent.

CONTRACTS—compensation for extra work not provided in—when award for may be made. Where it appears from the evidence that claimant did extra work, in the performance of a contract for construction of bridge, such work not being within the terms of such contract and having been authorized by proper State Department, an award may be made for the value of same, as fixed in the proposal and specifications, forming part of said contract, for extra work.

MR. JUSTICE YANTIS delivered the opinion of the court:

Plaintiff's claim herein rests upon two contracts awarded it in November, 1932. One provided for the construction of a concrete bridge in DuPage County, and the other provided

for the construction of three concrete bridges in McLean County. Claimant seeks damages on the DuPage County job on the three following grounds:

- (a) Change in plans by respondent.
- (b) For labor difficulties encountered by claimant, resulting in winter construction and other expenses incident to a 90-day delay.
- (c) Lack of cement.

Claimant seeks damages in connection with the McLean County contract on S. B. I. Route No. 119 on the alleged grounds as follows:

- (a) Loss, due to delay in awarding contract incident to right of way.
- (b) Additional expense incurred because of interference from paving construction.
- (c) Lack of cement.

The record discloses that on August 17, 1932 respondent, through the Division of Highways, of the Department of Public Works of Illinois, solicited bids for the work in question. On September 7, 1932 claimant's bid for the DuPage County work, in the sum of Twelve Thousand Four Hundred Forty-nine and 08/100 (\$12,449.08) Dollars, was declared to be the lowest bid. The next lowest bid being Eight Thousand Eight Hundred Forty-eight and 62/100 (\$8,848.62) Dollars in excess of claimant's bid.

Claimant's bid was accepted on October 14, 1932, and on November 10, 1932 a written contract was entered into between respondent and claimant for the construction of said DuPage County bridge. Claimant was also the low bidder for the McLean County bridge work described in the complaint, and a contract was awarded to it on November 10, 1932. Under the specifications for the latter work same was to be finished by December 31, 1932, but it was discovered that the Division of Public Works lacked certain right of way releases for one of the bridges and a delay in signing the contract resulted, and such contract was not signed until December 27, 1932. On the same day that bids were submitted for the foregoing Bridge work, i. e. on September 7, 1932, bids were also received for paving a section of S. B. I. Route No. 119 in the territory where the McLean bridge work was to be constructed. A contract was awarded for same in the latter part of September, and such pavement was under construction during the time claimant was engaged in the building of such bridges.

Claimant complains that the delay in signing the contract, due to the absence of release of right of way, and the additional expense of getting its material to the bridge sites on account of interference from the paving construction work, and the further lack of cement in sufficient quantities at the times required, all resulted in a material loss to claimant, and they seek a total award for such alleged damages in the sum of Twenty-nine Thousand Five Hundred Seventy-nine and 13/100 (\$29,579.13) Dollars.

The court has considered the testimony and exhibits in full and with earnest care. The evidence discloses a labor situation to have apparently existed in DuPage County, which would have justified claimant in instituting criminal procedure. There would be no purpose served for us to recount the testimony at length in regard to the nature of the labor difficulties encountered by claimant, for however deplorable such condition may have been, and whatever the loss to claimant therefrom, there is nothing in the record or in the law upon which claimant can herein predicate a claim for damages against the state. A. L. Nelson, vice-president of claimant company, testified (Transcript, p. 7-8) that he had investigated the condition in DuPage County, and had learned of the difficulty incident to the construction work which they might there encounter prior to the time that the contract for the work was signed; that they considered declining the contract but upon being urged by Mr. Cleveland, Director of the Highway Department at that time, they proceeded to execute the contract and commence the construction of the work. There is some conflict in the record as to what assurances were given by Mr. Cleveland as to what aid claimant might expect if they encountered the expected labor troubles, but the fact remains that claimant signed the contract, anticipating such troubles, and they cannot now justifiably expect an increase in their contract payments because of the fact that such labor troubles did arise. The record discloses that a conference was held with Mr. Cleveland in January, 1933 and claimant's summary of this agreement is set forth in a letter from claimant to Mr. Cleveland, under date of January 5, 1933, in which they state:

1. That claimant would continue to keep work closed down until afforded an opportunity to operate under reasonable working conditions.

2. That they take immediate steps to remove such equipment from the site as represents rental expense incident to the work.

3. That they would protect property on the grounds and maintain watchman service; claimant expecting reimbursement for the carrying out of such arrangements together with rental of steel sheeting then in place.

4. Unless advised to the contrary, assumption by claimant that procedure would meet with approval of the Department.

To this letter Director Cleveland replied, under date of January 10th—

1. Correcting certain statements made in the above letter.

2. Authorizing a temporary shut-down of work from thirty to sixty days; claimant to secure cooperation from county authorities in protecting workmen.

3. No release from obligations.

4. Non-allowance of any extra compensation for additional costs resulting from temporary shut-down, either for watchman, protection of materials and equipment or rental charges; all of such items of cost to be borne by the contractor.

We do not believe that the record justifies claimant's charge that respondent's letter of January 10th "was apparently written for the files" only.

Plaintiff's claim for payment for extra work authorized by respondent on the DuPage County job is supported by the evidence. Under Paragraph 9 of the proposal it is provided that additional work not provided for in the original specifications may be called for and the costs thereof duly paid plus 15%. It apparently became necessary to lower the east abutment of the DuPage County bridge about two feet after the excavation work under the regular specifications had been completed. The Division authorized such additional work on March 3, 1933 and claimant proceeded with the construction under the revised plan. They now contend for an allowance of One Thousand Two Hundred Seventy-two and 69/100 (\$1,272.69) Dollars as the amount due therefor, covering costs plus 15%. Respondent denies the correctness of these figures, particularly two items thereof, i. e. One Hundred Seventy-five (\$175.00) Dollars and One Hundred

(\$100.00) Dollars in connection with placing and removing reenforcing steel and sheeting. Respondent contends that the award for such extra work, if any, should be in the sum of Eight Hundred Three and 71/100 (\$803.71) Dollars. A portion of this work was done by a sub-contractor named Swanson. Respondent's figure of Eight Hundred Three and 71/100 (\$803.71) Dollars was arrived at partly from payroll data taken from the books of The L. E. Myers Company, and partly from the resident Engineer's memory (respondent's Exhibit 8). Claimant erected the concrete forms and placed the reenforcing steel according to the original plans, and when these plans were changed it apparently become necessary to remove the concrete forms and reenforcing steel in order to lower the footing the required two feet. It was then necessary to erect the concrete forms and to again replace the reenforcing steel. Thereafter respondent decided to widen the footing and claimant was again forced to dismantle the forms, remove reenforcement and again place same in their former position. Claimant's request for allowance for such extra work in the sum of One Thousand Two Hundred Seventy-two and 69/100 (\$1,272.69) Dollars, is we, believe, substantiated by the record.

We will now consider the situation under the McLean County Contract. Is claimant entitled to damage because of any delay in obtaining the right of way in connection with the construction of the McLean County bridges? The first portion of the delay complained of is, that while the bid was received on September 7, 1932 and the contract provided that the work must be completed by December 31, 1932, respondent did not in fact execute and deliver the contract until December 27, 1932, only four days prior to such completion date. Claimant contends that as a result of such delay it was required to commence its work under arduous winter conditions instead of in the autumn; that the expense thereof was much greater, and that they could have used their equipment to additional advantage had they been able to complete their contract within the time fixed by it. Unfortunately for claimant, the record is not in accord with their conclusions. When plaintiff signed the contract for the work in question on December 27th, they then knew and expected either to prosecute the work through the winter months or to have several

months' delay because of winter conditions before they could complete same. Mr. Nelson testified (p. 103 transcript) that at the time he signed this contract he knew that the company would either have winter work to do, or that they would have to delay doing any work for three months until spring came. He further testified that in now submitting this claim they are not claiming rental for their equipment on account of winter work but are making a claim because of extra expense encountered as a result of such winter work. The point is not that plaintiff was unable to proceed with work in the early fall of 1932 as indicated by the completion date in the contract, but that they signed such contract at approximately the termination date thereof under conditions which they could not help but understand would entail difficulties from winter hazards not encountered in summer work, or that they might suffer additional delays by reason thereof. Of this, they cannot now complain. There is no merit to their complaint as to the delay occasioned in obtaining the right of way for one of the bridges. This question was disposed of prior to the time claimant signed its contract by an agreement entered into between claimant and the Highway Division, based upon claimant's proposal that it would begin the construction of the two bridges in McLean County, and if the right of way for the third bridge in question was not obtained by the time the balance of the work on the other two bridges was finished, then claimant should not be required to complete its contract as to such third bridge. Claimant recites this in its complaint, and further that the Division finally awarded the contract on that basis, and same was signed and accepted by claimant.

The evidence discloses that the State acquired the right of way for the third bridge by the time the contractor was ready for same (transcript p. 84). Therefore, claimant was obligated to proceed with such construction and no demand for additional compensation for same is now allowable.

Under Paragraph 3 of the third count of plaintiff's claim an award is sought because of additional expense to which claimant was put in making lengthy troublesome detours in getting material on the ground, due to the fact that paving work was under way at the same time, under a contract awarded to the Capitol Construction Company for paving a

section of Route No. 119 contiguous to such bridge sites. We find from the testimony of Vice President Nelson (transcript p. 105), "That at the time when the letting of the bridge contracts in McLean County was advertised, there was also advertised at the same time a letting for the paving work in question." Mr. Nelson further testified that he knew about that matter at that time, and that in his experience at times the contracts for slab and bridge work are let at the same time. The fact that claimant may have anticipated that the paving contractor would delay the construction of such pavement until claimants were through, is not justified by the record or by the custom for such construction work in Illinois, as indicated by the proof herein. No allowance for damages on this ground seems warranted.

A further objection is made by claimant on the ground of delay experienced in obtaining cement. It is common knowledge that respondent had a difficult situation to face in obtaining cement at reasonable prices for its highway construction work during the period covered by the contracts in question. A careful examination of the record herein has been made to ascertain whether claimant suffered from any such shortage. Their general statements to that effect are not conclusive as against the detailed evidence appearing in the record. It is disclosed therein that on April 28, 1933 plaintiff notified the Highway Department that it was in need of more cement (plaintiff's Exhibit M). The date books maintained by respondent's engineers disclose the following as to the dates immediately thereafter:

- April 29th—Heavy rain, no work.
- April 30th—Rain, no work.
- May 1st—Rain, quit work on account of mud.
- May 2nd—Rain, impossible to pave.
- May 3rd—Too muddy to pave.
- May 4th—Too muddy to pave.
- May 5th—Rain.
- May 6th—Water, no work.
- May 7th—Heavy rain.
- May 8th—Water on grade, pumping out coffer-dam, notified Mr. Payne that cement could be obtained at Route 122, Station 127, two and one-half miles to LeRoy.
- May 11th—Rain and high water, no men working. Notified Mr. Payne to make arrangements to haul cement from R. 122.

May 12th No men working. Mr. Nelson of The L. E. Myers Company on job; asked about securing cement. Informed him of securing cement from R. 119, S. 101, R. 122 at Hopedale. Inspected cement in storage at Hopedale.

For several days thereafter it continued to rain. Cement was in fact apparently secured from time to time in approximately sufficient amounts under existing weather conditions, and the record does not successfully show that any serious loss or disadvantage was suffered by claimant upon such score.

It is the opinion of the court that all of plaintiff's claim should be denied, except that portion appearing under the second count for extra work, in the sum of One Thousand Two Hundred Seventy-two and 69 100 (\$1,272.69) Dollars for which latter amount an award is hereby entered in favor of claimant.

(Nos. 2295-2296, Consolidated—Claim denied.)

JOHN B. KING, No. 2295 AND HELENA A. HATHAWAY, No. 2296,
Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed December 14, 1937.
Rehearing denied January 13, 1938.

FRANK J. JACOBSON, for claimants.

OTTO KERNER, Attorney General; JOHN KASSERMAN AND GLENN A. TREVOR, Assistant Attorneys General, for respondent.

PERSONAL INJURIES—sustained as result of negligence of State employee—State not liable for—doctrine of respondeat superior not applicable to State. While individuals and private corporations may be liable for damages caused by the negligence of their servants or agents, under the doctrine of respondeat superior, said doctrine is not applicable to the State and it is never liable to respond in damages for the negligence of its officers, servants or agents, in the conduct of a governmental function and no award can be made on a claim based on such negligence.

SAME—same—award for damages as result of cannot be made on grounds of equity and good conscience. An award for damages for personal injuries or damages to property cannot be made on the grounds of equity and good conscience when same are sustained as the result of the negligence of an officer, servant or agent of the State, regardless of the degree of such negligence, or the absence of contributory negligence on part of injured party or the extent or seriousness of such injuries.

EQUITY AND GOOD CONSCIENCE — *claims which State should pay in—meaning of* Use of the words, claims which the State in equity and good conscience should pay, in Act creating Court of Claims refers to claims against the State for which there is a legal basis at law, and as State if suable would not be responsible for damages for personal injuries sustained as the result of the negligence of its officers, servants or agents, doctrine of respondent superior not being applicable to it, there is no legal basis at law for claim based on such negligence and consequently no award could be made on grounds of equity and good conscience.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimants herein seek damages as the result of an automobile accident, alleged to have been caused by the negligence of one Peter Sauber, a former employee of the State in the Highway Department. The complaint alleges that on March 30, 1932, about 4:30 P. M., on Route No. 64 about three miles west of St. Charles, Illinois, the claimants were riding in a Buick automobile owned by the mother of claimant, Mrs. Hathaway, and then and there driven by the owner's colored chauffeur. That Peter Sauber was the owner of and in possession and control of a Model A. Ford Truck with which he drove out from a side entrance leading to a filling station, into the pathway of claimants, causing them to swerve back and forth across the road and to eventually crash into a nearby tree causing serious injuries to both claimants. Claimant in each case seeks an award of Fifteen Thousand (\$15,000.00) Dollars, and as the facts, the law and the parties in each case are the same, the two actions have been consolidated and are herewith considered under a single opinion. Rather extensive evidence has been produced, and comprehensive briefs and reply brief have been filed.

A motion by the Attorney General to dismiss the complaints was filed and argued orally before the court, but action thereon was postponed until a final hearing of the case on its merits. Plaintiffs contend that the record discloses the accident was caused by one who was then and there in the employ of the State and then and there engaged in the duties of his employment; that the accident having occurred through the negligence of one so employed, the State of Illinois should be liable as the master of such servant by reason of justice, equity and good conscience.

The Attorney General, on behalf of respondent, contends that although Peter Sauber was an employee of the State

of Illinois, he was not, at the time of the accident, engaged in the performance of any work for his employer; that the accident was not the result of such employee's negligence; that even though the employee was negligent and in the performance of his duties as an employee, the respondent could not be legally liable because of the fact that the doctrine of "Respondent Superior" does not apply to the State in connection with the negligent acts of its employees. Counsel for claimant states:

"There can be no denial that the doctrine of respondent superior does not apply to the State * * * as an ordinary legal defense, but placing ourselves squarely under the section of the enactment (Court of Claims Act) which provides for Equity Jurisdiction and Procedure, the fact that the doctrine of respondent superior does not apply does not in any way abate claims before this Court * * *. That the court has been granted equitable powers for the purpose of hearing and determining matters in accordance with equity and good conscience."

The evidence discloses that Peter Sauber was an employee of the State, engaged in assisting the Highway Maintenance Patrolman assigned to the territory in question. That he went to work at 7 o'clock A. M. on March 30, 1932; was off thirty (30) minutes for lunch, quit work at 4:30 P. M. and was employed and paid for nine (9) hours work on the day in question. That after he left his superior he drove his Ford truck to the Anderson Filling Station on the south side of Route No. 64 about three miles west of St. Charles, where he stopped and unloaded certain tools that were being kept there. His home was several miles west of that point and he drove out from the filling station onto Route No. 64 to go westward to his home.

Sauber testified that he saw plaintiff's car coming from the west before he drove onto the highway; that it was traveling at a speed which he estimated at seventy (70) miles per hour, but that he drove in, on and across the highway to the north side thereof intending to let it go by; that the approaching car was going eastward and swung toward the north side of the pavement so that he found it necessary to swing to the left to avoid a collision; that he proceeded westward without knowing that any accident had occurred. Another car, driven by one Ebert Olson, was coming from the east at the time Sauber drove out onto Route No. 64 which Sauber testified he also saw; that at the time he drove onto the highway plaintiff's car was about four hundred (400) yards away and

traveling seventy (70) miles an hour; that the Olson car that was coming from the east at that time was "about again as far away," but that he had no opinion as to the latter's speed.

Olson testified that Sauber's truck "came out of a driveway at the Barbecue Stand onto the highway. The next thing I noticed was that a car had to swerve out to miss him, had to go out into the other lane to miss hitting this truck and it was a good thing it wasn't coming any faster;—in order for this car that swerved out to miss me he had to cut back. The next thing I knew he was in the ditch—I observed the truck as I approached the Barbecue Stand. It came out suddenly, then it kind of stopped or slowed down after it got in the road—it was right in the way of eastbound traffic."

The evidence discloses that while it had been misty wet weather, the pavement was dry at the time of the accident. The witness Olson, observing that Sauber was leaving the scene of the accident without stopping, pursued him for three miles, then drove in front of him and compelled him to stop. Sauber testified that Olson then said to him, "Say, you side-swiped a car up there by Anderson's and you'd better go back. I told him 'hell I am late, I am going home.' He says, 'it will go harder with you if you don't go back.' I says to myself, 'Is that possible?' and I went back.' "

Meanwhile, King and Mrs. Hathaway had been removed from the scene of the wrecked car to the filling station. Both were badly bruised and bleeding. The former suffered a fracture of the right Clavicle, a dislocation of the Humerus and injury to the Scapula, a scalp wound in front of the right ear and down the side of the face, and his teeth had gone through his tongue, making a slit that required several stitches. Mrs. Hathaway had suffered paralysis of the left facial nerve, a fracture of the right Pubic bone, a fracture of the right Radius and Ulna, a fracture of the first, second, third, fourth and fifth Metacarpal bones of the right hand, and a concussion at the base of the skull. Sauber testified that upon his return to the scene of the accident he did not talk to anyone except a neighbor who happened to arrive at that time, and that he then went home and called a local police officer and returned with him to the scene of the accident, at which time the injured parties had been removed. The testimony not only of Olson and the other witnesses, but that also of Sauber, shows that the accident was the result of the lat-

ter's negligence and indifference to the rights of anyone other than himself. His employment by the State ceased a few months after the accident in question, and he is no longer employed by it. Claimants have, without doubt suffered serious injuries and pecuniary damages as a result of such accident.

It is not within the province of this court however, to make an award and to recommend the expenditure of State funds in favor of everyone who may have suffered some injury or injustice at the hands of the State or its employees. Counsel for Claimants in a most able manner presents his theory of the rights of this court to exercise its powers under a broad administration of the doctrine of equity and good conscience. Emphasis is given to the fact that prior to the creation of the original Claims Commission no action to enforce any claim against the State could be instituted in any court, and that it was necessary for any claimant to obtain the friendly and active intercession of a member of the legislature and obtain the benefit of a special Bill appropriating an amount for each specific claim. That many who had just and rightful demands were not fortunate enough to enjoy a political friendship or acquaintanceship which would enable them to have a Bill drawn or presented and were thus deprived of their opportunity for redress, while claims of a less meritorious character might receive preferment and recognition. Counsel argues that in the creation of the Claims Commission and later of the Court of Claims, the legislature intended to establish a forum so broad in its power that not only would there be a court to which the claimant might submit his demands against the State, but that the court in giving consideration thereto should be governed only by the demands of good conscience and social justice. Counsel further contends that by establishing the Court of Claims the legislature intended to say that no longer would it be the rule that the Doctrine of "Respondet Superior" does not apply to the State, but that thereafter the State should be liable for all such negligent acts of its servants and employees as the members of the court in conscience and equity might deem it responsible for.

The court cannot agree with Claimants' Counsel in these views. When the State provided for a forum in which claims against it might be filed, first under the Commission of Claims

Act of 1877 and later under the Court of Claims Act of 1903, a clause therein provided substantially as follows:

"In case said Commission (Court) shall reject any claim so filed as aforesaid, upon the hearing thereof; such rejection shall conclude all parties thereto, unless said Commission (Court) shall in their award, otherwise direct."

The Court of Claims Act of 1917 contains no such provision. Guided doubtless by the wording of the earlier Acts, the commission (and court) handed down many decisions in which they quoted the above provision and thereafter added in substance the following:

"In order that claimant may present his claim to the Legislature we expressly direct, that under the power conferred upon us by the section, claimant shall not be concluded by the above finding rejecting any claim" (*Schmidt vs. State*, 1, C. C. R. 76.)

In *Rood vs. State*, 2, C. C. R. 23, the court after rejecting the claim stated:

"Inasmuch however, as we recognize that this is a case appealing strongly to sympathy, the sustaining of the demurrer is hereby declared to be without prejudice to claimant, and the rejection of the claim is not to barr claimant from further presentation of this claim to the Legislature."

Later the court, as in *Holmes vs. State* 3, C. C. R. 17 declined to make an award, but nevertheless recommended that the legislature make an appropriation because they believed the claimant was entitled thereto.

After the Court of Claims Act of 1917 was passed with its omission of the proviso of the earlier Act, the court, in certain instances after rejecting the claim for the reason that "under the law the State is not liable" then proceeded to exercise an arbitrary opinion in much the same language as found in *Hunsacker vs. State*, 4, C. C. R. 217, where after rejecting the claim the court said:

"Regardless however, of legal liability claimant has sustained injuries as a result of this accident, and the court recommends to the Legislature an allowance to claimant, as an act of social justice, in the sum of \$2,000.00," and again in *Moore vs. State*, 4, C. C. R. 229, where it was stated,

"While this court has repeatedly held in this class of cases that the State is not liable, yet in view of the advanced age and poverty of the claimant, and in the interest of social welfare and equity, we have decided to make a small allowance for claimant, and we recommend the payment of \$200.00."

Under the practice adopted by the members of the court we thus find awards being given and a recommendation for

appropriation of funds made entirely on the basis of the personal views of the judge without regard to any established rule, or guide of law or conduct. As a result, we find a denial of relief of one case and an award of another, in cases on all fours with each other.

Eventually, the error in granting awards because of "good conscience," and in cases wherein no legal basis for an award existed, the court returned to what had been the original concept of its duty and expressed itself as in the words of Justice Thomas, in *Stoddard vs. State*, 6 C. C. R. 29, wherein he said:

"We do not believe it was the intention of the Legislature to leave it discretionary with the Commission to make an award in favor of the claimant regardless of the question as to whether or not he had a legal claim against the State. We are of the opinion further that it would be an exceedingly dangerous precedent to hold that the Commission had any such discretion."

The present court in 1933 was called upon to construe the meaning of Paragraph 4 of Section 6 of the Court of Claims Act, with reference to the meaning of the words "equity and good conscience" as therein used. In the case of *Crabtree vs. State*, 7, C. C. R. 207, the following conclusion appears:

"We conclude, therefore, that Section four (4) of Paragraph six (6) of the Court of Claims Act, which provides as follows, to-wit: 'The Court of Claims shall have power: 'to hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, ex contractu and ex delicto, which the State as a sovereign commonwealth, should, in equity and good conscience, discharge and pay'; merely defined the jurisdiction of the court, and does not create a new liability against the State, nor increase or enlarge any existing liability; that the jurisdiction of this court is limited to claims in respect of which the claimant would be entitled to redress against the State either at law or in equity, if the State were suable; that this court has no authority to allow any claim unless there is a legal or equitable obligation on the part of the State to pay the same, however much the claim might appeal to the sympathies of the court; that unless the claimant can bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure such an award. The claimant having failed to bring himself within the provisions of the law entitling him to an award, there is nothing this court can do but deny the claim."

We re-affirm the foregoing at this time. We believe that in passing the Court of Claims Act the legislature recognized that in equity and good conscience the State should provide a means and manner in which claims against it might be heard.

but that it did not in the creation of the court intend to create new liability against the State nor enlarge any then existing.

In Pomeroy's Jurisprudence, Vol. 1, p. 343 the following conclusion is expressed:

"In following out the policy assumed to have been intended by the Legislature, it has been settled that the courts took no powers or jurisdiction over any equitable right or to administer any equitable remedy, except those plainly permitted by the express and positive language of the statutes."

We believe that the use of the words "Claims—which the State in equity and good conscience should pay" refers to claims against the State for which there is a legal basis at law, but for which the claimant prior thereto had no adequate redress, because all other courts were closed to such claimant when seeking redress against the State.

"Another significance sometimes given to equity is that of judicial impartiality * * * the administration of the law according to its true spirit and import, uninfluenced by any extrinsic motives or circumstances * * * the application of the law to particular cases, in conformity with the special intention or general design of the Legislature."

(Pomeroy Vol. 1, p. 36.)

We believe it is in this sense that the legislature used the word "equity" in prescribing the jurisdiction of the Court of Claims, and it is in this spirit that the court is endeavoring to consider the claims that come before it.

We therefore hold in the instant case that inasmuch as the claims herein are predicated upon the purported negligent acts of Peter Sauber as an employee of respondent, that the motion of the Attorney General to dismiss the complaints should be allowed, for the reason that the rule of "Respondent Superior" does not apply to the State insofar as the negligent and tort actions of its employees and servants are concerned; that such being the rule and there being no legal basis upon which said claims may rest, no award can be allowed on the ground of equity and social justice, for the reason that this court has no authority to allow a claim unless the claimant can bring himself within the provisions of some law giving him the right to an award, and that in the absence thereof a claimant cannot invoke the bare principles of equity and good conscience to secure such an award.

As this case has been submitted upon the evidence as well as upon the motion, we feel constrained to add that the record in our opinion discloses without doubt that the accident in question and the injuries suffered by claimants were

due to the wanton negligence of Peter Sauber, without contributory negligence upon the part of claimants; further that although Peter Sauber was an employee of respondent, he was not, at the time of the accident in question, engaged in the performance of his duties for his employer; that he had worked nine hours for respondent on the day in question and had, according to the testimony in the record, completed his day's work at 4:30 in the afternoon; had unloaded all tools used by him in the performance of his duties, and at the time of the accident was performing no duties or services on behalf of his employer, and that in the absence of the exception to the rule of "Respondent Superior," there would be herein no legal basis for the assessment of an award against the State of Illinois.

Both upon the merits and upon the motion, an award must be denied.

The motion to dismiss the complaints is allowed, and an award in each case is hereby denied.

(No. 2096—Claimant awarded \$220.05.)

LOUIS OLSEN, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 13, 1937.

Rehearing denied January 13, 1938.

MARSHALL SOLBERG and KELLAM FOSTER, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN and GLENN A. TREVOR, Assistant Attorneys General, for respondent; CARL DIETZ, of Counsel.

PRIVATE PROPERTY—*taken by State for public use—constitutional liability for payment of compensation therefor.* Under Section 13 of Article 2 of Constitution of Illinois, private property shall not be taken or damaged for public use without just compensation, and where State appropriates a portion of land of claimant for use in construction of highway, an award will be made for the value thereof.

SAME—same—basis for determining value of. Where a portion of private property is taken by State for construction of highway, without payment of compensation therefor, the best basis for determining the value thereof is that fixed by verdict of jury and judgment thereon, for remainder of same kind of property, in condemnation proceeding.

PROPERTY DAMAGE—*property not taken for public use—alleged to have been caused by public improvement—when award for must be denied.* Where it appears from findings in verdict of jury in condemnation proceeding to

acquire a portion of land for public use, from evidence in record, and examination of property by court, that there is no damage to the fair, cash market value of adjoining land not taken, by reason of the public improvement, an award for any such alleged damage is not justified and an award must be denied.

MR. JUSTICE YANTIS delivered the opinion of the court:

At the April term, 1931, the Village of Fox Lake instituted proceedings in the Circuit Court of Lake County for condemnation in its own name, against Louis Olsen, to secure certain lands for public highway purposes. Three parcels of land were included therein, but only one is involved in the present claim. On May 15, 1931, a trial was had and a verdict rendered, with judgment entered against the Village of Fox Lake and in favor of Louis Olsen for right-of-way, and damages, if any, to land not taken, in the sum of One Thousand Three Hundred Fifty (\$1,350.00) Dollars. Prior to the condemnation suit an old road had existed at the point in question, called Sayton Road. After the condemnation suit the State constructed a section of S. B. I. Route No. 60 at said point, and it was for the purpose of inducing the construction of this section of hard road that the Village of Fox Lake condemned the land in question. It was the intention of said village to acquire a strip of land bordering on the east side of Sayton Road and extending from the north to the south limits of claimant's property. Through some inadvertence a small area was omitted from the description of parcel No. 3 which they sought to acquire. The hard road when constructed included within its bounds the five (5) foot strip in question and a piece of ground approximately 19.90 feet, x 57.71 feet. Claimant now avers that such additional footage has been improperly, wrongfully and illegally used by the defendant and is still being so used without the claimant having received anything in compensation therefor. He claims damages for the wrongful taking of the strip and for the shortening of his lots fronting on Route No. 60 as a result thereof. Claimant further contends that the Department of Public Works and Buildings changed the grade along the frontage of claimant's property, making his property inaccessible to said road and rendering same valueless as a result thereof; that such grading was unnecessary, and that such road could have been constructed with a reduction of the grade, thereby saving damage to claimant's property.

Claimant further contends that representatives of the Department of Public Works and Buildings represented to him that the fixed grade of the road would be low enough so that they could and would fill in his lots to a level therewith at no expense to him; that prior to this time, in reliance upon his belief that the grade of the road would not be raised, claimant had filled in his land to about the level of the former road, at an expense of Twenty Thousand (\$20,000.00) Dollars, and that the expense to which he would now be put in order to raise his grade to the newly established grade would involve an expense of approximately Twenty-six Thousand (\$26,000.00) Dollars more.

In his original complaint claimant asks damages:

- | | |
|--|-------------------|
| 1. For the strip of land taken and for damages due to the shortening of the property frontage, in the sum of..... | \$ 3,000.00 |
| 2. For expense of 34,716 cubic yards of fill required to re-establish a fill to bring his abutting property to the newly established grade | 26,000.00 |
| 3. Additional damage suffered by reason of raising of grade and rendering claimant's property less accessible..... | 3,500.00 |
| | <hr/> \$32,500.00 |

Thereafter, an Additional Count to Claimant's Declaration was filed, with Bill of Particulars attached, in which he alleges his damages as follows:

- | | |
|--|-------------------|
| 1. Reasonable market value of strip of land described in Bill of Particulars, known as claimant's "Exhibit C," taken, occupied and used by respondent and part of Route No. 60, for which no compensation has been paid to claimant..... | \$ 2,000.00 |
| 2. Decrease in the reasonable market value of claimant's premises not taken from \$35.00 a front foot to \$15.00 a front foot along a 915 foot frontage..... | 18,300.00 |
| | <hr/> \$20,300.00 |

Respondent filed a Demurrer, to Plaintiff's Declaration, now treated as a motion to dismiss, and same has been considered with the case. A large amount of evidence has been taken, and the court, because of the extensive record and the amount involved, has personally viewed the premises in order to better familiarize themselves with the matter appearing in such evidence.

The variance in measurements used in the construction of the hard road in question seems to have resulted from the fact that years ago a five (5) foot strip was at first withdrawn

and later added to Sayton Road, and thereafter when measurements were made for the construction of the hard road in question, such measurements were apparently taken from the fifty-five (55) foot dividing line instead of the fifty (50) foot dividing line, but in the condemnation proceedings the additional five (5) feet were omitted, and as a result of such variance the actual construction work included the five (5) foot strip for the length of claimant's property, without same having been included in the condemnation proceedings. Claimant was present at the construction site at various times, consulting with the local engineer as to the location of culverts and other matters of interest to him, as an adjoining land owner, and neither he nor anyone else apparently observed from the location of survey stakes and such construction work that same was encroaching upon any land not intended to have been included in the condemnation proceedings. Claimant first observed or learned of such discrepancy when he saw the plat in the office of Mr. Ball, one of the engineers of the State Highway Department, (Transcript P. 58). Claimant's acreage from which the strip of ground was acquired for such roadway purposes is at the edge of the Village of Fox Lake, adjoining the railroad tracks and is a low poorly drained tract. Condemnation proceedings were resorted to for the purpose of acquiring the ground desired for the construction of the section of hard road in question. The jury in such proceedings viewed the premises, returned a verdict, and a judgment was entered upon such verdict fixing the just compensation for the taking of the property described therein at the sum of One Thousand Three Hundred Fifty (\$1,350.00) Dollars. That verdict contained the following finding: "We, the jury, further find, from the evidence, that there is no damage to the fair cash market value of the adjoining premises of the defendant herein as described in the cross-petition filed in this cause." It appears that a conference was held at the time the condemnation proceedings were being had at Waukegan, in the spring of 1931, at which time there were present, Mr. Olsen and his Attorney Mr. Hall, Mr. Hollister the Mayor of Fox Lake, Mr. Hurley their Village Attorney, and Mr. L. W. Gunn of the Lake County Highway Office. Others present were, Mr. Frank Howard and Mr. Skiller, owners of other properties involved, and the former's Attorneys Messrs. Schultz and Rosch. The conference was in

Judge Dady's Chambers and he was present a part of the time. Mr. Leo A. Murphy, a Civil Engineer in the employ of the State Highway Department at that time, attended the meeting by request and answered various questions put to him as to the amount of fill that would be taken out of the roadway in the course of construction, near Mr. Olsen's front age. Claimant testified:

"The burden was brought on me to settle this without a hearing, and I agreed to take it if they would put it back in the same condition and make the same grade. I asked for it, to have it in writing and Mr. Hollister (Mayor of Fox Lake) stated he could not give it in writing, as he had nothing in writing from the Highway Department to show that he could get that (14,000 cu. yds. of fill), only what they told him. Judge Dady said I could take Hollister's word for it that I would get that *if the Engineers gave them the fill.*"

Claimant further testified (Transcript P. 46):

"The engineers said they had that amount of fill to put in there * * * I said to Hollister * * * if he was to be holdup man he could just as well do it openly and not go behind my back."

It appears elsewhere in the record that only approximately half of the amount of fill was taken from the roadway and placed on claimant's land that was anticipated in advance, and as hereinabove noted. This fact forms a part of the basis of plaintiff's claim.

There is much conflicting evidence in the record as to curves, grades, elevations, value of claimant's land before and after the improvement, and the cost of additional fill to establish certain grades. The court has carefully considered all of same; but in the view we take of the claim it is not necessary to comment at length in regard to a large part thereof.

The State of Illinois did not acquire the right-of-way in question in the first instance. The Highway Department of Illinois would not interest itself in the construction plans until the village acquired such right-of-way. Being unable to agree with claimant and obtain a deed for the required footage, they resorted to condemnation proceedings. A transcript of such proceedings appears as a part of the record in this case. Counsel's contention that the comments made by the mayor of Fox Lake, Assistant Engineer Murphy and others in the conference during the condemnation proceedings would constitute an agreement or stipulation in open court to do certain things which would reduce the injury to property not taken, and thereby prevent damages that would

otherwise occur or exist, are not concurred in by the court. We agree with the following statement and citation as a matter of law, as contained in Counsel for Claimant's Reply Brief, to-wit:

"In reference to the agreement to furnish fill in *Elgin, Joliet and Eastern Illinois Railroad Co. vs. Fletcher*, 128 Ill. 619, 626, where the court said: 'We think it is competent upon the trial of a condemnation case, for the party seeking condemnation to bind itself by an offer in open court to the performance of duties like those here offered to be performed, (agreement in open court to maintain fences along its right-of-way over property of land owners and to construct and maintain an undercrossing) and to thereby, and to the extent that such performance will prevent damages that would otherwise occur, abridge the claim by the land owner for damages.'"

In the case at bar however, no stipulation appears in the record and the only statements that can be construed as an offer to furnish fill in any quantity to claimant, were the engineer's answers as to the amount of fill that might be expected, as shown by the specifications and Judge Dady's statement to claimant that the latter could take Mayor Hollister's assurance that he would get such fill, "if the engineers gave it to them."

The court is of the opinion that there is nothing contained in the record by which to attach any liability to the State for damages to lands of claimant not taken. Both by the jury's findings to that effect in the condemnation proceedings, and from the further taking of the five (5) foot strip and additional footage involved in this complaint, the court at this time on its own account, finds, from the evidence now before us, that there is no damage to the fair cash market value of the adjoining premises of the defendant herein as described in the complaint herein filed. We believe claimant is entitled to further recompense for the number of feet of ground taken by the State in the actual construction of the section of the road in question. Some doubt remains after a careful study of the record as to whether he in fact understood that the highway was to occupy the actual physical quantity of ground which would include the area now in dispute, or whether he knew where the boundary lines would be, as disclosed by the description appearing in the condemnation proceedings, but the fact remains that the disputed area was not included in the condemnation proceedings; that it was owned by claimant; that it was taken by the State and is now

being used as a part of S. B. I. Route No. 60; and that no payment has in fact been made for same.

As previously stated by the court, we believe it fundamental for the State to observe that *Section* of the *Constitution* which reads, "Private property shall not be taken or damaged for public use, without just compensation." *Sec. 13, Art. 2.*

The value of the land included in the condemnation proceedings has been established by the verdict and judgment rendered in such proceedings. No better basis for determining the value of the additional footage which would without doubt have been included in the description, if the necessity therefor had been known, can be used than by applying a proportionate value on the basis of the One Thousand Three Hundred Fifty (\$1,350.00) Dollars previously paid. A computation of the acreage for which Olsen was paid is 0.7878. The acreage in the piece not described and for which compensation is now asked is 0.1290, or 16.3% of the land paid for. Claimant is therefore entitled to 16.3% of One Thousand Three Hundred Fifty (\$1,350.00) Dollars, or Two Hundred Twenty and 05/100 (\$220.05) Dollars. The Demurrer of Respondent is therefore denied, motion to dismiss overruled and an award is hereby allowed in favor of claimant LOUIS OLSEN for the sum of Two Hundred Twenty and 05/100 (\$220.05) Dollars, in payment of land taken for highway purposes as described in the complaint herein.

(No. 2840—Claimant awarded \$1,116.85.)

CLARENCE VAUGHN, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 8, 1938.

K. C. RONALDS and CHAS. E. COMBS, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—when award for compensation under Act may be made. Where employee sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra hazardous employment, an award may be made for compensation therefor, in accordance with the provisions of the Act, upon compliance with the terms thereof.

MR. JUSTICE LANSFORD delivered the opinion of the court:

For more than one year prior to August 26th, 1935 claimant was employed by respondent as a guard at the Illinois State Farm, a penal institution conducted by the respondent at Vandalia, Illinois. On the night of August 25th, 1935 claimant slept in the quarters provided by the respondent for its guards, who were called for duty shortly before five o'clock A. M.

Under the regulations in force at such State Farm, all guards, while on duty, are required to carry revolvers. About 4:55 A. M. on said 26th day of August, 1935, while claimant was getting dressed after the regular call for duty, his revolver slipped off the bed where he had temporarily placed the same, and struck the floor, whereby it was discharged, and a 32-caliber bullet therefrom struck the claimant on the right shin bone, causing a longitudinal fracture of the right tibia.

Claimant was taken to the Mark Greer Hospital at Vandalia, where he remained about three weeks, and was then removed to his home. He was treated at the time of the accident by Dr. Miller Greer who continued to treat him until the time of the hearing herein. X-ray pictures taken shortly after the accident disclosed that the main body of the bullet has passed through the leg; also that there were numerous lead scrapings along the bone;—which it was considered inadvisable to disturb. The leg continued to swell while in use, for a year after the accident, and claimant still walks with a limp. Claimant is thirty-five years of age, six feet tall, and weighs two hundred twenty-five pounds.

The only medical evidence in the case is to the effect that claimant has sustained a permanent loss of 50% of the use of his right leg.

The evidence in the record clearly shows that the operation of the institution at which claimant was employed is an extra-hazardous enterprise, within the meaning of those words as used in Section Three (3) of the Workmen's Compensation Act.

From the testimony in the record we find as follows:

That claimant and respondent were, on the 26th day of August, A. D. 1935, operating under the provisions of the Workmen's Compensation Act of this State; that on said date the claimant sustained accidental injuries which arose out of

and in the course of his employment; that notice of the accident was given to respondent and claim for compensation on account thereof was made within the time required by the provisions of such Act; that the average annual earnings of the claimant during the year preceding the injury in question were \$1,188.00; and his average weekly wage was \$22.85; that claimant at the time of the injury was a married man and had one child under the age of sixteen years; that the necessary first-aid, as well as all medical, surgical and hospital services have been provided by respondent; that claimant was totally disabled from the date of his injury as aforesaid to November 4th, 1935, to-wit, for a period of ten weeks; that claimant has sustained a permanent loss of fifty per cent of the use of his right leg, and has been paid the sum of One Hundred Seventy-three Dollars (\$173.00) to apply on the compensation due him.

Claimant is therefore entitled to have and receive from the respondent the following sums, to-wit:

1. Twelve Dollars and Fifty-seven Cents (\$12.57) per week for ten (10) weeks, that being the period of temporary total disability.

2. The further sum of \$12.57 per week for ninety-five (95) weeks, to-wit, Eleven Hundred Ninety-four Dollars and Fifteen Cents (\$1,194.15), for the permanent loss of fifty per cent (50%) of the use of his right leg, as provided by Section Eight (8), paragraphs E-15, E-17, and J-1 of the Workmen's Compensation Act;—all of which compensation has accrued at this time.

The total amount of compensation for temporary total disability and for specific loss as above set forth, is Thirteen Hundred Nineteen Dollars and Eighty-five Cents (\$1,319.85). From this amount there must be deducted the sum of One Hundred Seventy-three Dollars (\$173.00) which has heretofore been paid to the claimant as above set forth, leaving a balance due claimant of Eleven Hundred Forty-six Dollars and Eighty-five Cents (\$1,146.85), which is payable at this time.

Award is therefore entered in favor of the claimant for the sum of Eleven Hundred Forty-six Dollars and Eighty-five Cents (\$1,146.85).

This award being subject to the provisions of an Act entitled "An Act Making an Appropriation to Pay Com-

pensation Claims of State Employees and Providing for the Method of Payment Thereof," approved July 3d, 1937 (Session Laws of 1937, page 83), is, by the terms of such Act, subject to the approval of the Governor, and upon such approval, is payable from the General Fund, in the manner provided by such Act.

(No. 3164—Claimant awarded \$100.00.)

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION.
Claimant, vs. STATE OF ILLINOIS. Respondent.

Opinion filed February 8, 1938.

KNAPP, ALLEN & CUSHING, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

SERVICES RENDERED—*lapse of appropriation before bill presented—when award may be made for.* The facts in this claim are almost identical with those in *Horst & Stricker Company, vs. State*, No. 3191, *infra*, and what was said in that case applies with equal force herein.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein seeks an award of One Hundred (\$100.00) Dollars for freight demurrage on two of its cars. The record discloses that on December 12, 1935 pursuant to orders received through the Department of Public Welfare, the two cars in question were set out for loading with crushed stone at the Illinois State Penitentiary, Joliet, Illinois, and were on that date duly loaded with crushed stone; that after having been so loaded they remained at the penitentiary quarry until December 31, 1935, at which time orders were given claimant to move the cars to the new prison at Joliet.

During the above period of time there was in effect a duly published tariff, whereby the shipper was granted forty-eight (48) hours free of demurrage time, after loading cars within which to give orders for disposition of same. After the expiration of such forty-eight (48) hours, a daily demurrage charge of Five (\$5.00) Dollars per day is provided for under the tariff regulations.

Under the Average Demurrage Agreement Rule as provided for in Jones' Demurrage Tariff, No. 4-P, E. J. & E. ICC 2855, Item 740, Rule 9, the demurrage for the two cars

amounts to One Hundred (\$100.00) Dollars. At the time such charge was incurred, there remained a sufficient unexpended balance in the appropriation from which such payment would have been made, which appropriation however lapsed on September 30, 1937.

The Attorney General on behalf of respondent concedes the merit of the claim. The service was lawfully ordered, was given in good faith, and while no reason is shown as to why the cars were held over the extended period of time, the failure to move same was not that of the claimant.

The case falls within the ruling heretofore made in the case of *Rock Island Sand & Gravel Co. vs. State*, 8 C. C. R., 165, and similar cases wherein the court has held—

"Where claimant has rendered services or furnished supplies to the State on orders from an official authorized to contract for same and submits a bill therefore within a reasonable time, and has not received payment therefor, and such non-payment is due to no negligence or fault on the part of claimant, an award for the reasonable and customary value of such service will be made if, at the time the obligation was incurred, there were sufficient funds remaining unexpended in the appropriation to pay for same."

An award is hereby allowed in favor of claimant in the sum of One Hundred (\$100.00) Dollars.

(No. 3157—Claim denied.)

JOHN R. KAID, Claimant, vs. STATE OF ILLINOIS, Respondent

Opinion filed February 8, 1938.

FRANK P. MIES, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

MOTOR VEHICLE LICENSE FEE—claim for refund where use of vehicle for which issued discontinued during period thereof—must be denied. The statute providing for the licensing of motor vehicles contains no provision for a refund of license fee, where licensee discontinued use of vehicle for which issued, during time, or part thereof, for which issued, and consequently no award can be made for any refund, in such case.

MR. JUSTICE YANTIS delivered the opinion of the court:

On or about the 1st day of August, A. D. 1937 claimant applied to the Secretary of State for registration of a 1923 Buick automobile, and forwarded a check for \$10.50 for a license for the balance of the year 1937. In due time, ac-

According to his complaint, he received his license and the automobile plates, and the check was duly cashed by the Secretary of State.

On December 6, 1937 claimant filed his claim for a refund, stating that his wife had been in some character of accident and had suffered severe injuries, and that claimant had been unable to make use of the license plates.

The Attorney General has filed a motion to dismiss the claim, as being predicated upon no rule or basis upon which a refund could legally be made.

No basis for a refund is shown by the complaint. The motion is allowed and the claim is dismissed.

(No. 3156—Claimant awarded \$10.40.)

ILLINOIS COMMERCIAL TELEPHONE COMPANY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 8, 1938.

F. W. ADDIS, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

SERVICES—lapse of appropriation out of which payable, before payment — how award may be made for. The same question presented here was before the court in the case of Commercial Acetylene Supply Co., Inc. vs. State, No. 2921, supra, and what was said in that case is applicable herein.

MR. JUSTICE YANTIS delivered the opinion of the court:

A stipulation of facts filed herein, discloses that claimant was engaged in 1936 and 1937 in supplying telephone service to the Illinois State Police Headquarters at DuQuoin, Illinois, the latter being operated by the State through its Division of Highways, Department of Public Works and Buildings. In December, 1936 certain changes were made by claimant, at the request of respondent, in the type of equipment and services rendered such Police Headquarters. These changes resulted in a change of rate from \$9.08 per month to \$14.73 per month, with an additional "service connection" charge of \$3.00. It further appears that through no fault of claimant, a portion of the charge which had accrued was not paid, and R. R. MacLeod, Chief Accountant, Division of Highways, re-

ports under date of December 15, 1937 that a balance of \$10.40 remains due and owing to claimant. The appropriation from which payment might have been made lapsed September 30, 1937, and at the time the indebtedness was incurred and at the time said appropriation lapsed, there remained therein an unexpended balance sufficient to have paid such bill.

This case comes within the rule that,

"Where claimant has rendered services to the State upon lawful request, and due to no fault upon claimant's part the bill therefore is not paid before the appropriation from which it is payable lapsed, an award will be made, where at the time the debt was incurred there were sufficient funds remaining unexpended in the appropriation to pay for same."

Rock Island Sand & Gravel Co., 8 C. C. R. 165.

An award is hereby allowed in favor of claimant in the sum of Ten and 40/100 (\$10.40) Dollars.

(No. 3986--Claimant awarded \$183.44.)

WILLARD H. ATKINS, Claimant, vs. STATE OF ILLINOIS, Respondent

Opinion filed February 8, 1938.

DIXON, DEVINE, BRACKEN & DIXON, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made under.* Where it clearly appears that employee of State sustained accidental injuries, arising out of and in the course of his employment while engaged in extra hazardous enterprise, an award for compensation for same may be made in accordance with provisions of Act, upon compliance with the terms thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant had been employed at the Dixon State Hospital as a domestic for several years. On the 16th day of October, A. D. 1936 while operating a bread slicing machine, the first and second fingers of claimant's left hand came in contact with the slicing blade, and the latter cut off the index finger through the second phalanx, and the second finger was amputated at the joint surface on the distal end of the second phalanx.

The record shows that the respondent had actual notice of the accident through claimant's superiors, immediately

thereafter; that oral demand was made of the Managing Officer for compensation, within thirty-five (35) days after the occurrence of the accident, and that claim for compensation was filed within seven (7) months after the injury occurred.

At the time of the injury claimant was receiving Sixty-two (\$62.00) Dollars per month in cash, Twelve (\$12.00) Dollars of which was partial maintenance, and his maintenance allowance was further figured at an additional Twelve (\$12.00) Dollars per month, making a total wage and maintenance of Seventy-four (\$74.00) Dollars per month. All medical and hospital bills were furnished by respondent. Plaintiff's claim recites that, although he was absent from work for thirty-three (33) days during which time he was totally disabled, he received his full wages during the time of such disability and non-performance of duties.

From the facts appearing herein it is admitted by all parties that both claimant and respondent were operating under the terms of the Workmen's Compensation Act. In describing various extra-hazardous enterprises the Workmen's Compensation Act provides as follows:

"7½. Any enterprise in which sharp-edged tools, grinders or implements are used * * * etc."

(Sec. 3 and Sub-sec. 7½ of Sec. 3, W. C. A.)

As plaintiff's temporary total incapacity lasted for more than thirty (30) working days he was entitled to compensation therefor of fifty per cent (50%) of his earnings, in a sum of not less than Seven and 50/100 (\$7.50) Dollars and not more than Fifteen (\$15.00) Dollars per week. (Sec. 8 (a), (b), W. C. A.)

Paragraph 8 (e) 7 of the Act provides that the loss of more than one phalange shall be considered as the loss of the entire finger. The court therefore finds from the record that claimant is entitled to an award for the total loss of the first finger and the loss of one phalange of the second finger. His total wages for the year preceding the accident were Eight Hundred Eighty-eight (\$888.00) Dollars. This amounts to Seventeen and 92/100 (\$17.92) Dollars per week, fifty per cent (50%) of which is Eight and 96/100 (\$8.96) Dollars. We find that claimant is entitled to an award as follows:

| | |
|--|----------|
| For the loss of the first finger of the left hand, \$8.96 for 40 weeks | \$358.40 |
| For the loss of one phalange of the second finger of the left hand, \$8.96 per week for 17½ weeks..... | 156.80 |
| For temporary total disability for 33 days, i. e., 4 weeks and 5 days, at \$8.96 per week..... | 42.24 |
| | <hr/> |
| | \$557.44 |
| Credit for payment of wages paid in full during disability.. | 74.00 |
| | <hr/> |
| Balance of award due..... | \$483.44 |

An award is therefore hereby made in favor of claimant Willard H. Atkins, in the sum of Four Hundred Eighty Three and 44/100 (\$483.44) Dollars.

As time of payment of the entire amount due has accrued between the time of the accident and the present, payment of the award in full should be made at this time, as having been already earned.

This award being subject to the provisions of an Act entitled, "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," approved July 3, 1937 (Sess. Laws 1937, p. 83), and being, by the terms of such Act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from said appropriation from the General Revenue Fund in the manner provided for in such Act.

(No. 2666—Claim denied.)

L. O. STANTON, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 24, 1938.

Claimant, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—highways—negligence of employees of State engaged in construction or maintenance of—State not liable for—respondent superior doctrine of not applicable to State. In the construction or maintenance of its public highways, the State acts in a governmental capacity, and is not liable for the negligence of its officers, agents or servants in connection therewith, the doctrine of respondent superior not being applicable to it.

MR. JUSTICE LANSFORD delivered the opinion of the court:

This claim was filed pro se, and alleges that on December 13, 1935, claimant was driving his automobile on Route 6, at its intersection with Wolf Road, in Joliet, and stopped at the gas station at the southeast corner; that he turned back onto Route 6, going west, and when near the center of the highway, Illinois highway maintenance truck, No. 338, side-swiped his automobile, bending in and slightly breaking the upper rear right panel of the body, and crushing both right rear and front fenders and breaking off the right front hub cap. Claimant further alleges that the road at this point is a full four track concrete highway and was dry and free of ice and snow and the driver of the truck had full view of the car, with plenty of room to pass on either side.

Under these facts, the driver of the truck would be liable and most every other employer would be liable, but the State would not be liable.

The estimated cost to repair his car was \$48.35, but claimant arranged to have the labor job done for \$20.00.

Claimant assumes that the State stands in the same position as an individual or a corporation, and is liable for all damages caused by the negligence of its agents or employees. In this, claimant is in error.

The Attorney General has made a motion to dismiss and that motion must be sustained for the following reasons:

That the rule is universal that the State is never liable for the negligence of its agents and employees unless there is a statute making it so liable. This rule has been so often announced by this and other courts that it would seem it should now be well known. The following are but a few of the many cases announcing the rule: *United States vs. Kirkpatrick*, 9 Wheaton, 720; *Story on Agency*, 9 Ed., Sec. 319; *Johnson vs. State*, 2 Ct. Cl. 165, and many others too numerous to mention.

The motion of the Attorney General to dismiss will, therefore, be sustained and the cause is dismissed.

(No. 2602—Claimant awarded \$119.65.)

LESTER HAMPLEMAN, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 24, 1938.

WRIGHT & KAMIN, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—when award for compensation for loss of finger may be made under. Where it clearly appears that employee of State sustained accidental injuries, arising out of and in the course of his employment, while operating a grinder, resulting in the loss of first phalange of index finger, an award may be made for such loss, in amount provided in Act, such employment being extra hazardous thereunder and no question being raised as to notice or jurisdiction.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Lester Hampleman, claimant, filed his claim to adjust his claim under the Workmen's Compensation Act, with the Clerk of this court, and alleges that on the 30th day of August, 1934, he was employed by the State of Illinois, as a helper in the kitchen in the Illinois State Hospital for the insane at 6400 Irving Park Blvd., Chicago, Illinois, and on that date he was grinding cabbage, and the grinding knife cut off the end of his index finger. Claimant was given first aid. He alleged that he was temporarily disabled for a period of five weeks and in addition thereto, sustained a permanent injury to the index finger of the right hand. He also alleged that he received his wages during the time that he was incapacitated and was allowed to live at the institution. He received \$48.60 per month as salary, and it is charged that his board and room was of the value of \$24.00 per month, in addition thereto.

No question arises as to notice.

The facts are all stipulated, and it appears from the stipulation that as a result of the accident claimant underwent an operation on the index finger of the right hand; that he made an uneventful recovery from said injury and operation; that Dr. E. Perry Vaughan, would testify to the same effect as the affidavit attached to the stipulation. In this affidavit the Doctor states that the index finger of the right hand is shorter by the length of one phalanx than the index finger of left hand.

Claimant is 25 years of age, and has no children. He makes no claim for medical or surgical services, or for temporary total disability.

It has been the holding of this court that:

Not every state employee is under the Workmen's Compensation Act, but it is only where the employee is engaged in an employment, extra-

extra-hazardous in fact, or employed in a department of the State which is engaged in an enterprise declared to be extra-hazardous by Section 3 of the Workmen's Compensation Act of Illinois, that such employee is under the Act and legally entitled to an award for injuries sustained in the course of and arising out of the employment.

The statute gives this court jurisdiction of the parties and the subject matter.

The claimant was an employee of the Illinois State Hospital and under Section 5 of the Compensation Act, the hospital is defined to be an employer within the meaning of the Act.

Under Subparagraphs 2 and 6 of Subsection (c) of Section 8, it is provided that compensation for the loss of the first phalange of the index finger of the right hand is equal to one-half of fifty per centum of the average weekly wage for forty weeks.

Under the facts in this case, we hold that claimant is under the Compensation Act and entitled to compensation. His employment apparently is definitely within Subsection 7 1/2 of Section 3 of the Compensation Act, and declared to be extra-hazardous thereunder. That provision declares to be extra-hazardous—

"Any enterprise in which sharp edged cutting tools, grinders or implements are used, including all enterprises which buy, sell or handle junk and salvage, demolish or reconstruct machinery, except as provided in subparagraph 8 of this section."

Claimant was injured while operating a grinder used for grinding cabbage, and his employment would, therefore, be declared to be extra-hazardous.

Claimant's wages were \$48.60 a month, plus maintenance valued at \$24.00 per month, making an annual wage of \$871.20, and an average weekly wage of \$16.75. The record shows that he had been employed in this capacity for more than a year. He is, therefore, entitled to compensation for the loss of the first phalange of the index finger, which under the statute is equal to one-half of fifty per centum of the average weekly wage for forty weeks, or the sum of \$167.50. He did, however, receive compensation from the State during his temporary total disability from August 30 to October 12, a period of 5 5/7 weeks, in the total amount of \$95.71. Under Subsection (b) Section 8 of the Compensation Act, claimant was entitled to compensation for temporary total incapacity in a sum equal to fifty per centum of his weekly wage for 5 5/7

weeks, or \$47.85. Therefore, claimant was overpaid \$47.85 for his temporary total compensation. Deducting this amount from \$167.50, the amount due for the specific loss, leaves a balance of \$119.65.

An award, therefore, is hereby made to Lester Hampman in the sum of \$119.65, payable in a lump sum.

This award being subject to the provisions of an Act entitled, "An Act making an appropriation to pay compensation claims of State employees and providing for the method of payment thereof," approved July 3, 1937 (Sess. Laws 1937, p. 83) and being, by the terms of such Act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from the appropriation from the General Revenue Fund in the manner provided for in such Act.

(No. 2707--Claimant awarded \$1,650.00.)

MARGARET M. LAVELLE, WIDOW AND THOMAS F. LAVELLE, A MINOR AND NEXT OF KIN OF LEO JAMES LAVELLE, DECEASED, BY MARGARET M. LAVELLE, HIS MOTHER AND NEXT FRIEND, CLAIMANTS, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 24, 1938.

CARL I. DIETZ and BEN T. REIDY, for claimants.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—highways, hard surfaced public construction and maintenance of—deemed maintenance and construction of structure within meaning of. The construction and maintenance of a hard surfaced public highway is the maintenance and construction of a structure under the Workmen's Compensation Act.

SAME—extra hazardous employment—duties of State Highway maintenance policeman are—when award for compensation for injuries sustained by may be made under. The duties of a State highway maintenance policeman are extra hazardous in fact, and of such a nature as to be properly classified as such, under provisions of Workmen's Compensation Act, and where it clearly appears State highway policeman sustained accidental injuries, resulting in his death, arising out of and in the course of his employment, and jurisdiction of court is unquestioned, an award for compensation may be made to those entitled thereto in accordance with provision of Act.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

On March 8, 1933, Leo James LaVelle was employed by the Division of Highways, Department of Public Works and

Buildings of the State of Illinois, as a State highway maintenance policeman at a salary of \$1,800.00 per annum, and was later assigned to active duty in District No. 7 of the Illinois State Highway Maintenance Police, with headquarters at Rock Island, Illinois. He was continuously employed in that capacity until September 24, 1934 when he suffered fatal injuries in a motor vehicle accident occurring on State Bond Issue Route No. 80, in the Village of Rapids City, County of Rock Island, State of Illinois.

On that date, at about 2:00 p. m. Officer LaVelle was driving a motorcycle owned by the State, east on said State Route No. 80, in the performance of his regular duties at a speed of about thirty-eight miles per hour, and was passing through the Village of Rapids City; that upon reaching the intersection of First Street with said State Route No. 80, he was struck by, or collided with an automobile owned and operated by one Mary M. Hubbs, of East Moline, Illinois, and incurred serious personal injuries, viz.: fracture of the right tibia and fibula and the knee joint, fracture and posterior dislocation of the right femur at the hip joint, severe cuts and lacerations on the head and right leg; internal hemorrhages of the abdomen seriously impairing the functioning of the stomach, pancreas and liver, also a severe nervous shock.

Officer LaVelle was immediately taken to the Moline City Hospital where he received medical care and attention, and thereafter, he was operated upon on two different occasions. Dr. E. F. Condon of Rock Island, Illinois, was the physician and surgeon in charge of the case and he was assisted by Dr. Daniel F. Paul of Rock Island, Illinois, and Dr. P. A. Bendixon of Davenport, Iowa, was also called in for consultation and assistance during the operations. LaVelle remained in the hospital until November 24, 1934 when he died as the result of the injuries incurred.

Sergeant James Vickrey was LaVelle's immediate superior, and was immediately notified of the accident and made an investigation thereof, and on September 25, 1934, made an official report thereon to his superior, Officer L. M. Taylor, the then Acting Superintendent of State Highway Police, Springfield, Illinois.

The respondent paid the several physicians and hospital expenses, being a total sum of \$1,303.13. Dr. Condon is claiming a further fee of \$25.00.

Following the accident and death of claimant's intestate, his personal representatives took action to recover damages from Mary M. Hubbs, and pursuant to an order of this court, James L. Hughes, as executor of the estate of Leo James LaVelle, deceased, was authorized by this court to make a settlement with Mary M. Hubbs. It appearing that there were no eye witnesses to the accident and that officer LaVelle was driving at the rate of 38 miles per hour in the Village of Rapids City, it was deemed better to make the settlement than to risk a trial by a jury. The sum of \$2,500.00 was paid and Mary M. Hubbs was given a release for all damages.

LaVelle was forty years old at the time of the injury and left his wife, Margaret M. LaVelle, and one minor child, Thomas F. LaVelle, age four years, who were dependent upon him. His wife was appointed guardian of the child by the Probate Court of Rock Island County, on the 23rd day of June, 1937.

No question arises as to the jurisdiction of the court or other jurisdictional matters.

It has been the holding of this court that the construction and maintenance of a hardsurfaced paved public highway is the maintenance and construction of a structure under the Workmen's Compensation Act.

Bond vs. State, 7 C. C. R. 198, 199;

Pennington vs. State, 7 C. C. R. 253, 255,

and that a highway maintenance patrolman is entitled to the benefits of the Workmen's Compensation Act.

Church, et al. vs. State, 7 C. C. R. 256;

Lightner vs. State, 8 C. C. R. 354;

Ferguson vs. State, 8 C. C. R. 589.

If the employee leaves any widow, child or children whom he was under legal obligations to support at the time of his injury, a sum equal to four times the average annual earnings of the employee, but not less in any event than two thousand five hundred dollars, and not more in any event than four thousand dollars, shall be allowed, except where there is a child under sixteen years of age. Section 7a of the Workmen's Compensation Act provides that whenever in paragraph (a) of this section a maximum of \$4,000.00 is provided, such maximum shall be increased in the following cases to the following amounts: Four thousand four hun-

dred fifty dollars in case of one child under the age of sixteen years at the time of the death of the employee.

Claimants contend that they should be paid the sum of \$4,450.00, but admit that the sum of \$2,500.00 should be subtracted therefrom. In the present case, the widow has remarried, but the right of compensation is not extinguished but continues in favor of the child surviving.

Angerstein, 1930 and 1937 Ed. Sec. 195.

Under the Act, because the decedent left one child under sixteen years of age, the award normally would have been \$4,450.00 because decedent's salary was \$150.00 per month. The amount paid, however, by Mrs. Hubbs of \$2,500.00 must be deducted therefrom. After the accident and before his death, the decedent was paid his salary and this was in excess of what he would have received under the Compensation Act, and amounted to the sum of \$300.00, and any compensation payments other than necessary medical, surgical or hospital fees or services shall be deducted in ascertaining the amount payable on death, under Section 7a of the Workmen's Compensation Act. Dr. Condon's bill in the sum of \$25.00 must be denied because it appears from the evidence it was for the services of a pathologist in making an analysis of the vital organs of the deceased after his death, and these services were not rendered to the deceased in endeavoring to cure him. Deducting the amount paid by Mrs. Hubbs and the over-payment of salary in the sum of \$300.00, there appears to be a total amount of \$1,650.00 still due and owing. The widow having remarried, this should go to the minor son, Thomas Francis LaVelle. The widow, Margaret LaVelle, now Margaret LaVelle Bolyea has been appointed his guardian and has agreed that all payments should be made payable to her, as guardian of Thomas Francis LaVelle.

Ordinarily, this compensation would have been paid at the rate of Fifteen Dollars (\$15.00) per week from the time of the death. It is contended by the Attorney General that \$2,500.00 having been paid, these payments should not commence until that sum would have been paid out at the rate of Fifteen Dollars (\$15.00) per week. The claimants contend that the sum of \$2,500.00 having been paid by a person not under the Compensation Act, and not as the result of any efforts on behalf of the respondent, and owing to the time that has elapsed since the death of decedent, the full sum of

\$1,650.00 is now past due, and we are inclined to take the latter view.

It is, therefore, the holding of this court that an award in the sum of \$1,650.00, shall be paid to Margaret LaVelle Belyea, guardian of Thomas Francis LaVelle, a minor.

This award being subject to the provisions of an Act entitled, "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," Approved July 3, 1937 (Sess. Laws 1937 p. 83) and being, by the terms of such Act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from the appropriation from the Road Fund in the manner provided for in such Act.

(No. 2511—Claimant awarded \$123.04.)

ROBERT SNYDER, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 24, 1938.

GEORGE E. MARTIN, for claimant.

OTTO KERNER, Attorney General; GLENN A. TELVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT: *when award for compensation under may be made.* Where employee sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra hazardous employment, an award for compensation may be made in accordance with the provisions of the Workmen's Compensation Act, upon proper notice of injury, claim made and application filed for same within time provided in Act.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This is a claim for compensation under the Compensation Act and claimant alleges that on the 12th day of August, 1934, he was employed by the State of Illinois in the Department of Public Works and Buildings, Division of Highways, and at the time of the accident he was engaged in lifting steel forms which were used in paving State Highway No. 147; that in lifting one of the steel forms, he had his left foot on the concrete slab and his right foot on the bank, about eighteen inches higher than the slab; that the form was covered with mud and very heavy; that he heard something "pop" in his back and fell to the ground and had to be assisted by a fellow-

workman to his feet, and was unable to proceed with his work.

Claimant was receiving fifty cents an hour and worked eight hours per day; had been working for the State hardly three days when the accident occurred, and says that it was four months before he was able to do any work, and at the time of his testimony he claimed to be bothered some by it. The injury was in his right hip. Shortly after the injury, Dr. Hargan taped claimant's back and gave him some medicine. The taping was renewed every two weeks and claimant remained under his care for four months. No bill was received for medical attention and the doctor died before the hearing. The last part of January and the forepart of February, claimant went to work clearing brush on a farm and worked four weeks in June, and since November, 1935, claimant worked on PWA jobs.

It has been the holding of this court that the State when engaged in the maintenance and repair of a structure, that is when such structure is commonly called hard surfaced roads, the employees of the state working in said Division are engaged in an employment governed by the provisions of the Illinois Workmen's Compensation Act.

Manhart vs. State, 8 C. C. R. 356.

No question arises as to the State having received notice of claimant's injury. It is the contention of the Attorney General that the temporary total disability was four months or sixteen weeks, and this is a fair construction of the evidence. Claimant was not in the employ of the State for a year prior to his injury and there is nothing in the record to show a full time basis the year around. Therefore, the services can be computed only under subsection (c), section 10, Illinois Workmen's Compensation Act on a basis of 200 working days. (*Stellwagon vs. Industrial Commission*, 359 Ill. 557). No proof of medical or hospital bills has been made and consequently no award can be made for them.

It appears that the claimant had no dependents. He was not married, but stated that he had a fourteen year old boy dependent upon him, but it does not appear why such dependency exists.

As we view this case, claimant would be entitled to an award for sixteen weeks total temporary disability. He had worked for the state only three days, and the evidence does

not disclose a full time basis the year around. His compensation was \$4.00 per day and must, therefore, be based on 200 working days under the statute. This would make his annual compensation, \$800.00. This sum divided by 52 weeks equals \$15.38 as the average weekly wage. He would, therefore, be entitled to \$7.69, pursuant to subsection (b), section 8, Illinois Workmen's Compensation Act, as his weekly compensation payment. Having been disabled for a period of sixteen weeks, he would be entitled to the sum of \$123.04, and there being no proof of medical or hospital bills, and there being no evidence to show that he had suffered a permanent partial incapacity, an award in the sum of \$123.04 will be made. Claimant is asking for the sum of \$288.00 as compensation for a period of 24 weeks, but the proof does not sustain that claim.

An award, therefore, in the sum of \$123.04 is made in favor of the claimant, Robert Snyder.

This award being subject to the provisions of an Act entitled, "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," Approved July 3, 1937 (Sess. Laws 1937 p. 83) and being, by the terms of such Act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from the appropriation from the Road Fund in the manner provided for in such Act.

(No. 2509—Claim denied.)

CHARLES A. NOVAK, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 25, 1938.

THOMAS A. MURPHY and FRANK R. EAGLETON, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

INDUSTRIAL OFFICERS—In the Department of Labor appointed after date Civil Administration Code became effective—claim for difference in salary between amount fixed by said Code and that fixed in Workmen's Compensation Act—Section 9 of Code (laws of 1929, page 751) controls and fixes salaries of and not Section 14 of Workmen's Compensation Act which provides for

for denied. The facts in this case are the same as those in *Mills vs. State*, 2d Court of Claims Reports, page 69, and the opinion in that case is controlling herein.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant by his counsel asks for additional compensation and avers that he was, on the 24th day of August, 1931, appointed Chairman of the Industrial Commission of the State of Illinois, by the Honorable Louis L. Emmerson, then Governor of the State, duly qualified as such and became actively engaged as such Chairman commencing September 15, 1931.

Claimant further avers that at the time of his appointment the salary of said office was fixed by Section 14 of the Workmen's Compensation Act of the State of Illinois, at \$7,500.00 per year, and continued to remain at said figure until his successor was appointed and qualified and had taken over the powers and duties of said office effective February 1, 1933, and that thereafter until June 1, 1933, he held over as an Industrial Officer in the Department of Labor, during which period his salary was fixed by Statute, Section 14 of the Workmen's Compensation Act at the rate of \$6,000.00 per year; that notwithstanding the salary of said Chairman of said Industrial Commission was fixed at \$7,500.00 per annum, the Fifty-seventh General Assembly appropriated only \$6,000.00 per annum for this office, as shown by the Session Laws of the State of Illinois, 1931, Page 149, and he was paid at said rate for his services as an industrial officer of the State of Illinois, while Chairman of the Industrial Commission, and he claims damages in the sum of \$2,520.83.

We had occasion to consider this question in the case of *Charles F. Wills vs. State of Illinois*, No. 2329, and we held: "The Civil Code and not the Workmen's Compensation Act apparently controls and fixes the salaries of Industrial Officers, and the salaries are there fixed at Five Thousand Dollars (\$5,000.00) per year. As claimant has received the full sum of Five Thousand Dollars (\$5,000.00) per year for his service as an Industrial Officer, and has apparently been paid the full amount of salary fixed by Law, an award herein must be denied."

For like reasons, the award in the instant case is denied and claim accordingly dismissed.

(No. 2223--Claim denied.)

GUS H. KAROLKES, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 25, 1938.

NICHOLAS P. CONGLIS, for claimant.

OTTO KERNER, Attorney General; JOHN KASSELMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*only applicable to employees of State engaged in extra hazardous enterprises named in—*not applied to all employees of State. The Workmen's Compensation Act does not automatically apply to all employees of the State, but only to those engaged in an employment in a department of the State which is engaged in extra hazardous enterprises, named in the Act.

SAME—*clerk in office of Attorney General, not extra hazardous employment.* A clerk employed in the office of the Attorney General is not engaged in extra hazardous employment, and if injured while so employed, no award for compensation for such injuries can be made under Workmen's Compensation Act.

MR. JUSTICE LANSFORD delivered the opinion of the court:

In presenting his claim for compensation, the claimant alleges that he went into the employ of the Attorney General of this State on February 1, 1925, and worked in the Chicago office; that on July 15, 1931, while attending to his duties, he was injured by the collapse of a chair upon which he was sitting; that from July 15, 1931 until March 12, 1932, he was treated by Dr. H. L. Peterson, and that on March 12, 1932, because of severe pains, he was forced to remain away from his duties, and thereafter until July 18, 1932, he was required to wear a brace to strengthen his back; that on said last mentioned date, he went to the Mayo Clinic at Rochester, Minnesota, where X-ray pictures were taken, and said pictures disclosed a forward displacement of the fifth lumbar vertebra; that an operation was necessary to correct the injury and as a result thereof, he was unable to work from July 18, 1932 until the claim was filed, and he further alleged in his complaint, that he would be unable to do any kind of work until January 1, 1934.

Claimant further alleged that his salary was Two Hundred Dollars (\$200.00) per month, and that he spent much money endeavoring to be cured, and he asks that this court

grant him such compensation as is just and equitable according to the statute in such case made and provided.

The original claim was filed on August 4, 1933. The Attorney General filed a demurrer to the claim, and on March 27, 1936, Nicholas P. Conglis, filed his appearance as attorney for the claimant, and on April 25, 1936, the claimant filed an amended claim. In the amendment it is alleged that the State of Illinois is one of the several states of the United States, and had full power and authority to create, maintain and keep within its territory several offices, among which is the office of the Attorney General; that the Attorney General was empowered to maintain and keep several offices in several cities in the State of Illinois, among which he has an office in the City of Chicago; that the claimant went into the employ of the Attorney General on the 1st day of February, 1925; that on the 16th day of July, 1931, while the claimant was engaged in the performance of his duties, he was injured when he attempted to sit on a certain swivel chair furnished by the State of Illinois, and located in the office of the Attorney General. It is also alleged that the injury became permanent; that he continued in the employ of the State up to and including the 1st day of January, 1933; that said injury increased and became complicated, and it became necessary for the claimant to have performed a serious operation on his spine; that on January 31, 1933, he was discharged by the State by reason thereof, and on several occasions thereafter, he filed his claim with the Honorable Otto Kerner, Attorney General of the State of Illinois, but no payment was made to him on account of his injuries. He further alleges that on the date of his injury there was in force in this State, the Workmen's Compensation Act, and reference is made to Section 3 thereof. It is charged that this statute automatically applied to the State and it became the duty of the State by reason of the statute to provide for claimant the necessary medical expenses and to pay to claimant the compensation payable to persons injured, when such injuries arose out of and in the course of their employment. Claimant avers that he served notice upon the Attorney General at Chicago, Illinois, of his injuries on July 15, 1931; that on the 3rd day of August, 1933, being within a year from the date of the last payment received by the claimant from the State,

claimant filed his original claim with the Clerk of this court; that on several occasions he communicated with the office of the Attorney General at Chicago and presented his claim for additional compensation, including compensation and reimbursement for medical services. He claims compensation at the rate of Fifteen Dollars (\$15.00) per week from the 1st day of January, 1933 for permanent injuries, said compensation to continue until the amount paid equals the amount which would have been payable as a death benefit.

A second count was filed and therein claimant alleged that it became the duty of the defendant, the State of Illinois, to exercise due care and caution for the safety of its employees, and to exercise such due care and caution to supply, maintain and keep the place where its employees were performing their duties in a safe and secure condition, but the State disregarded this duty and permitted a certain swivel chair to become in bad repair and condition; that the claimant was in the exercise of due care and caution for his own safety, and by reason of the defective condition of the chair, he sustained injuries. This amended declaration was filed on April 25, 1936.

The Attorney General filed a motion to dismiss the amended complaint and also the original complaint on the grounds that the claimant was not under the Compensation Act while in the performance of his duties as a clerk in the Chicago office of the Attorney General, and on the further grounds that neither the first claim filed herein, nor the amended claim, were filed within the time specified under Section 24 of the Compensation Act, and on the further ground that the employment in which the claimant was engaged is not within the terms and provisions of the Compensation Act.

In the second count of the amended complaint, an attempt is made to state a cause of action at common law.

The motion of the Attorney General must be sustained for several reasons. We have repeatedly held that the Workmen's Compensation Act does not apply automatically to the State or to municipal corporations unless they are engaged in an enterprise or business declared to be exceptionally hazardous under Section 3 of the Compensation Act.

Village of Chapin vs. Industrial Commission, 336 Ill. 461;

Garrin vs. State, 7 C. C. R. 236;

Harrison vs. State, 6 C. C. R. 397;

Scrioner vs. State, 6 C. C. R. 521.

No facts are alleged to show claimant to have been engaged in an extra-hazardous employment. Again it is the law that where the State is in the exercise of a governmental function it is not liable to respond in damages for the negligent acts of its officers, servants or employees and the doctrine of respondeat superior does not apply.

Pelka vs. State, 6 C. C. R. 390;

Sturrock vs. State, 7 C. C. R. 157;

Walen vs. State, 8 C. C. R. 501.

Claimant avers that he was paid for some medical services, but even so, that does not bring him within the provisions of the Compensation Act because the furnishing of medical, surgical and hospital services for an injured employee is not a payment of compensation and the time within which to make claim for the same is not governed by Section 24 of the Workmen's Compensation Act but by the general five year limitation period.

Wolfe vs. State, 8 C. C. R. 333.

There was a time in Illinois when payment of medical, surgical and hospital services was considered a payment of compensation or an acknowledgment of liability under the Compensation Act. The effect of this was to deprive claimants of payment of any medical services until liability under the Compensation Act was definitely established. The Act was amended by the legislature to the effect that the payment by the employer of hospital bills, medical services, etc., was not a payment of compensation.

Under no circumstances is the State liable at common law for any of the injuries sustained, and the claimant not having brought himself within the provisions of the Workmen's Compensation Act, the motion of the Attorney General must be sustained.

(No. 3159. Claim denied.)

CHARLES DAY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 25, 1938.

EVERETT LEWIS and R. E. SMITH, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

ILLINOIS NATIONAL GUARD—*organization and maintenance of, governmental function.* It is well settled that in organizing training and military camps, the State is exercising a governmental function and acting in its sovereign capacity, and is not liable for the negligence of the officers or members of the Illinois National Guard.

SAME—*negligence of officers or members of in leaving explosives exposed to public—personal injury resulting therefrom—State not liable for.* The State is not liable to respond in damages for personal injuries, alleged to have been sustained as the result of alleged negligence of officers or members of Illinois National Guard, in leaving explosives exposed to public, one of which it is alleged was handed to claimant and exploded while he was holding it.

RESPONDENT SUPERIOR—*doctrine of not applicable to State.* The doctrine of respondent superior is not applicable to the State, when in the exercise of its governmental functions.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant filed his petition on the 8th day of December, 1937, with the Clerk of this Court, alleging that on the 22nd day of August, 1937, the State of Illinois, had created a military unit of the State government of the State of Illinois and designated the same as the State Militia of the State of Illinois and said department was composed of regiments and companies of enlisted men and that among said companies was Howitzer Company, 130th Infantry, located at Mt. Vernon, Jefferson County, Illinois. It is also averred that the State had issued to its various military companies, war materials consisting of bombs, shells and other like high explosives, and that it was the duty of said companies, including Howitzer Company, 130th Infantry, to use the highest care and caution with said explosives in and about keeping the same securely packed or out of the reach of the general public, and at all times in the use of said explosives, not to permit any shell, bomb or explosive to be left in a position to be picked up or handled by any person not authorized so to do, but notwithstanding its duty in this behalf, the Howitzer Company, above mentioned, by and with the auth-

only of the State of Illinois, established and maintained what is known and designated as a Rifle Range, south of Salem, in the State of Illinois, which Rifle Range was for the purpose of practice by the members of said company in the firing, setting off, and exploding of the various and different kinds of shells and ammunitions of war so issued by the State of Illinois.

It is also averred that it is the duty of the State Militia to use the highest care and caution in and about the handling and the exposing of said shells and ammunitions of war, to insure the safety of persons at, upon or near the said Rifle Range, but the said State Militia company did carelessly, negligently and without regard for the safety of the general public, leave a certain shell loaded with high explosives upon, at or near the Rifle Range, and in consequence thereof, the shell was left in view of persons passing by said Rifle Range.

It is also averred that the danger in the handling of said shells and high explosives so issued, is only known by persons trained so to do, and that on the 22nd day of August, 1937, a shell or bomb, the exact name being unknown to the claimant, was picked up from the ground upon, at or near said Rifle Range and was given to the claimant, and while the claimant was using due care and caution for his own safety to the best of his knowledge, the shell or bomb exploded in his hand, tearing away one finger and a great portion of his right hand, and permanently injuring the same, to the damage of the claimant in the sum of Four Thousand Dollars (\$4,000.00).

The Attorney General has made a motion to dismiss this case on the ground that no cause of action is stated.

It goes without saying that the State of Illinois in its sovereign capacity has the right to maintain a State Militia or National Guard and to train the members thereof in the methods of modern warfare. In doing this it is a matter of common knowledge that the implements of war, including shells and bombs, and the handling thereof, are exceedingly dangerous, and it frequently happens that even the best informed suffer serious injuries in handling such dangerous explosives. It is not averred that the claimant had any right upon the premises where the bomb was found or that he was in the performance of any duty to the State. For aught appears in the complaint, the claimant was a trespasser upon

the premises, and the person who gave the claimant the bomb, or shell, was a trespasser.

It frequently happens that inquisitive people meddle with things that do not concern them in any way and suffer injuries thereby. Certainly, such people would not be entitled to damages in case of injury. The complaint avers that this shell or bomb "was picked up from the ground upon, at or near said Rifle Range and was given to this claimant and while the claimant was using due care and caution for his own safety to the best of his knowledge, the said shell or bomb exploded in the hand of this claimant, * * *." It is our opinion that such conduct on behalf of the claimant is inconsistent with the term "due care and caution." It is inconceivable that any person using "due care and caution" would handle a shell or bomb found at or near a rifle range.

This court has repeatedly held that the doctrine of respondeat superior does not apply to the State of Illinois, and we have repeatedly held that the State, in the organization, maintenance and operation of the Illinois National Guard and the training of the same, is engaged in a governmental function and is, therefore, not liable for death, personal injuries or property damage, occasioned by the negligence of the officers or members of the Illinois National Guard, or the officers, employees or agents of the State charged with the organization, maintenance, operation or training of said National Guard. (*Peterson vs. State*, 8 C. C. R. 9; *Winnebago County Forest Preserve Dist. vs. State*, 7 C. C. R. 95.)

The motion of the Attorney General to dismiss this case will, therefore, be allowed.

(No. 3155—Claimant awarded \$75.72.)

THE GOODYEAR TIRE & RUBBER COMPANY, INC., Claimant, vs. STATE
OF ILLINOIS, Respondent.

Opinion filed March 25, 1938.

GROVER C. HOFF, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE,
Assistant Attorney General, for respondent.

SUPPLIES—when award may be made for. Where duly authorized officers of State ordered supplies and received and used same for official use, an award may be made for reasonable value thereof.

MR. JUSTICE LINSOTT delivered the opinion of the court:

A stipulation between the parties show the facts to be that claimant is a corporation duly organized under the laws of Illinois; that pursuant to an order and request by respondent, through Ross E. Bowman, its stockroom clerk at the Illinois State Highway Central Garage, Division of Highways, Department of Public Works and Buildings, Springfield, Illinois, claimant on August 25, 1936, delivered to the said garage, the merchandise in question, which consisted of four automobile casings of the value of \$15.90 each and four red tubes at \$3.03 each, amounting to \$75.72, and the receipt of this merchandise is acknowledged, and no question arises about the price; that through an oversight, claimant neglected to send a bill for said merchandise to the Division of Highways before the lapse of the appropriation from which the same was properly payable; that there was money for the payment of these bills at the time of the sale, and the appropriation lapsed on September 30, 1937. No warrant was issued in payment of said merchandise and no other person, firm or corporation has any interest in this claim.

We have frequently held that where claimant has rendered services or furnished supplies to the state on the order or request of an official authorized to contract for the same, and submits a bill therefor within a reasonable time, and due to no negligence or fault on the part of claimant same is not approved and vouchered for payment before the appropriation from which it is payable lapses, an award for the reasonable and customary value of the services or supplies will be made where, at the time the obligation was incurred, there were sufficient funds remaining unexpended in the appropriation to pay for the same.

It appears that this merchandise was ordered on August 25, 1936. No good reason really appears why the claimant did not present its bill prior to September 30, 1937, and the fact that the agent of the claimant did not know that when that particular appropriation had lapsed there was no funds out of which the proper officer could make the payment, is no valid, legal excuse. The only extenuating circumstance is the fact that there is a five year statute of limitations law in this State, and they probably felt that the Statute of Limitations did apply to the State the same as it did to

every person, firm or corporation in the State, and that coupled with the fact that the proper agents of the State did receive the merchandise for official use, we feel justified in making the award, but this court is not adopting this as a general rule to make payments in cases of this kind.

An award, therefore, is made in the sum of Seventy five Dollars and Seventy-two Cents (\$75.72).

(No. 3171 Claimant awarded \$217.89.)

TED STREET, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 25, 1938.

HICKMAN & SCHWARTZ, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT--*when award may be made for partial loss of thumb under.* Where it appears that employee of State sustained accidental injuries, arising out of and in the course of his employment, while engaged in extra hazardous enterprise, resulting in partial loss of thumb, an award for compensation for same may be made in accordance with the provisions of the Act, upon compliance with the terms thereof.

Mr. Justice YANTIS delivered the opinion of the court:

Under a claim filed February 15, 1938 plaintiff seeks an award of Eight Hundred Seventy-two and 18/100 (\$872.18) Dollars for loss of time and injury to the thumb of his left hand, while employed on September 23, 1937 as a Highway workman on S. B. I. Route No. 1, near the City of Lawrenceville, Illinois. The record discloses that claimant was assisting a fellow-workman transfer a drum of asphalt from a truck to a heating kettle on the machine used for putting a traffic stripe on the cement highway. In so doing, the thumb of claimant's left hand was caught in a pulley and the injury necessitated amputation of the thumb at the Distal joint. Medical bills which were incurred, in the sum of Thirty-nine and 50/100 (\$39.50) Dollars, have heretofore been paid to Dr. A. R. Lindsay of Lawrenceville, Illinois, and Dr. W. A. Bittner of Paris, Illinois. Claimant has received temporary compensation in the sum of Fifty-five and 32/100 (\$55.32) Dollars, covering temporary total disability for four (4) weeks and three (3) days.

At the time of the accident he was being paid Fifty (50) Cents per hour for eight (8) hours a day. Neither he nor others similarly employed had been working as much as two hundred (200) days per year, and the latter figure is therefore, under the provisions of the Workmen's Compensation Act, to be taken as the minimum period in determining claimant's average annual earnings. Upon this basis his average annual earnings would have been Eight Hundred (\$800.00) Dollars and his average weekly wage would be computed at Fifteen and 38/100 (\$15.38) Dollars. He was paid for his temporary disability for four (4) weeks and three (3) days, the sum of Fifty-five and 32/100 (\$55.32) Dollars, but upon the basis of fifty (50) per cent of his average weekly wage of Fifteen and 38/100 (\$15.38) Dollars, or Seven and 69/100 (\$7.69) Dollars per week he should have been paid Thirty-four and 06/100 (\$34.06) Dollars, and an over-payment appears to have been made of Twenty-one and 26/100 (\$21.26) Dollars.

He is further entitled, under the provisions of the Illinois Workmen's Compensation Act, to a specific award for the loss of the first phalange of his left thumb. Section 8 (c) 1 of the Act provides for "Fifty (50) per cent of the average weekly wage during seventy (70) weeks for the loss of a thumb," and Section 8 (c) 6 provides, "That the loss of the first phalange of the thumb shall be considered to be equal to the loss of one-half of such thumb, and compensation therefor shall be one-half of the amount due for the total loss of the thumb."

An allowance of Seven and 69/100 (\$7.69) Dollars per week for thirty-five (35) weeks, being fifty (50) per cent of the average weekly wage, multiplied by one-half of the number of weeks allowed for total loss of the thumb, equals Two Hundred Sixty-nine and 15/100 (\$269.15) Dollars. Such amount is due the claimant, less the amount heretofore overpaid for temporary total disability of Twenty-one and 26/100 (\$21.26) Dollars.

An award is therefore hereby allowed to claimant in the sum of Two Hundred Forty-seven and 89/100 (\$247.89) Dollars. We further find that all of such compensation has accrued prior to this date.

This award being subject to the provisions of an Act entitled, "An Act Making an Appropriation to Pay Com-

pensation Claims of State Employees and Providing for the Method of Payment Thereof," Approved July 3, 1937 (Sess. Laws 1937 p. 83), and being, by the terms of such Act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from said appropriation from the Road Fund in the manner provided for in such Act.

(No. 3127. Claimant awarded \$95.66.)

JAMES GALLAGHER, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 25, 1938.

Claimant, pro se.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made for partial loss of use of foot.* Where it is found that employee of State sustained accidental injuries, arising out of and in the course of his employment, while engaged in extra hazardous occupation, resulting in partial loss of use of foot, an award for compensation may be made, in accordance with provisions of Act, upon compliance with the terms thereof.

SAME—*payment of compensation for temporary total incapacity and specific loss of part of use of foot—precludes payment of compensation under other provisions of.* Where employee is paid compensation for period of temporary total incapacity and for partial loss of use of foot, no award can be made for compensation under oath provisions of Act.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant James Gallagher of Brookville Township, Ogle County, Illinois, herein seeks an award of \$2,770.00 as compensation for injuries sustained by him while employed by the State of Illinois. The record is meager and unsatisfactory, due doubtless to the fact that claimant has endeavored to handle a compensation claim pro se. The record consists of a sworn complaint, filed September 23, 1937; a Departmental Report by M. K. Lingle, Engineer of Claims; a signed statement by claimant, approving or disagreeing with the respective statements made in such report; a waiver of the right to submit further evidence, signed by claimant and filed January 6, 1938; Statement, Brief and Argument by respondent; reply by claimant; respondent's reply; and claimant's second or supplemental reply. A number of matters are

brought out and discussed in the Argument that do not appear in the evidence itself, and the only evidence that is properly before the court is that contained in the sworn statement of facts and the Departmental Report, signed by Mr. Lingle.

From this evidence it appears that claimant was employed by the State of Illinois on November 14, 1936 as a workman in the construction of State Highway No. 77. While so employed, his foot slipped beneath the wheel of a highway division truck while the latter was backing up to dump its load at the point where claimant was working. Claimant was removed to the Dixon Public Hospital and was attended by Dr. L. M. Griffin of Polo, Illinois, who stated in his report that claimant had suffered a fracture of four Metatarsals, first and second Phalanx and the lower third of the Fibula. X-rays were taken and treatment rendered at the hospital from November 14th to November 20th. The cast that had been placed on his foot was removed by Dr. Griffin on December 1st, and he continued to treat claimant until January 5, 1937 when he dismissed the case with the statement, "claimant unable to do manual labor; injury not at a permanent stage; a slight deformity to result from injury." On January 19th claimant was again examined at the Dixon State Hospital and was found to be unable to work and should be given further treatment. On March 3rd, 1937 he was taken to Chicago and examined and treated by Dr. H. B. Thomas, Chief of the Department of Orthopaedics of the University of Illinois. While there he was lodged and fed at the Y. M. C. A. Hotel at the expense of the Highway Division. Claimant traveled back and forth from his home to Chicago at various times, remaining in the latter city for further treatment, and was finally released by Dr. Thomas on May 10th, 1937, at which time the latter stated, "that the patient's disability had been reduced seventy-five (75) per cent by Physiotherapy * * * present disability at that time fifteen (15) per cent." Compensation payments were stopped on May 15th, 1937 by the Highway Division, as it then considered the patient's case at a permanent stage.

Claimant had worked for the Highway Division from September 26th, 1936 until November 14th, 1936, during which time he received \$128.50. Total compensation had been paid to him from the date of his injury, November 14, 1936, until May 15, 1937, in the amount of \$10.00 per week, or a

total of \$260.00. In addition thereto, hotel, hospital and medical bills have been paid for him in a total sum of \$297.78, as shown by the Departmental Report. While the present claim is prosecuted pro se, it further appears that on two different occasions Robert L. Bracken of Dixon, Illinois requested, as attorney for claimant, copies of Dr. Thomas' Report on Gallagher's condition; both of such requests were apparently complied with.

Claimant seeks an award of \$1,847.00, under Section 8, paragraphs (d) and (h) of the Workmen's Compensation Act, averring that previous to his injury his weekly wage was \$20.00, and that since said accident the only work he has been able to do was for a period of three (3) weeks at an average weekly wage of \$11.22.

He seeks further damages in the amount of \$923.00, under the provisions of Section 19, paragraph (k) of the Act, alleging, "That the State has been guilty of unnecessary delay in conducting his case and in closing the same before the injury was at a permanent stage, and without his knowledge, thereby depriving him from any income for the period of May 15, 1937 to August 14, 1937."

It does not appear that there has been any unreasonable or vexatious delay of payment or intentional under-payment of compensation, or any frivolous delay upon the part of respondent, which would justify a penalty, under the provisions of Section 19 (k) of the Act. Whatever dissatisfaction claimant may have experienced is apparently to be attributed to his lack of competent legal guidance.

It is evident from the record that except for claimant's temporary total disability, his rights under the Act are for a specific loss of use of the foot. Section 8 (d) of the Act grants specific payment of fifty (50) per cent of the difference between the average amount which an employee earned before the accident and the average amount which he is able to earn in some suitable employment thereafter. Such provision however contains the further limitation that such payment shall govern, "except in the cases covered by the specific schedule set forth in paragraph (e) of Section 8." Said latter section provides, "That an injured employee shall receive compensation for the period of temporary total incapacity in accordance with the provisions of paragraphs (a) and (b) of said Section 8 for a period not to exceed sixty

four (64) weeks, and shall receive in addition thereto, compensation for a further period subject to limitations as to amount as in said Section 8 provided, for the specific loss, *but shall not receive any compensation for such injury under any other provision of the Compensation Act.*"

Said Section 8 (c) thereafter provides, under Sub-section 14 as follows:

"For the loss of a foot or the permanent and complete loss of its use fifty per centum of the average weekly wage during one hundred thirty-five (135) weeks."

Also, Sub-section 17 provides as follows:

"For the permanent partial loss of use of a member * * * fifty per centum of the average weekly wage during that proportion of the number of weeks in the foregoing schedule provided for the loss of such member * * * which the partial loss of use thereof bears to the total loss of use of such member."

At the time of the accident claimant was receiving pay at the rate of Fifty (50) Cents per hour on the basis of eight (8) hours per day. As his employment was not constant he comes within that minimum provision of the Act which provides for a basis of two hundred (200) days for compensation of wage average. Under such computation an annual wage estimate of \$800.00 would result in average weekly wages of \$15.38. Twenty-six (26) weeks of total temporary disability at fifty (50) per cent of such average weekly wage, or \$7.69 would have entitled him to \$199.94 temporary total disability. During the period of such temporary total disability he received in fact \$260.00, or an over-payment of \$60.06. The evidence as it now appears in the record supports a fifteen (15) per cent specific loss of use of one of claimant's feet. No place in the record can one ascertain which foot was injured. Under the provisions of the Compensation Act, and on the basis of the average weekly wage above stated, claimant would be entitled to \$7.69 for 20.25 weeks for such specific loss, amounting to \$155.72. From this should be deducted the sum of \$60.06 heretofore over-paid on temporary total disability, leaving a net award due of \$95.66. An award is hereby made in favor of claimant for said sum of \$95.66, all of which has heretofore accrued.

This award being subject to the provisions of an Act entitled, "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method

of Payment Thereof," approved July 3, 1937 (Sess. Laws 1937, p. 83) and being, by the terms of such Act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from said appropriation from the Road Fund in the manner provided for in such Act.

(Nos. 2582 and 2583—Claimant awarded \$127.00.)

JOHN REDENBAUGH, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 25, 1938.

FRANCIS T. CARSON and LLOYD S. ENGERT, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE and SVEINBJORN JOHNSON, Assistant Attorneys General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award for compensation under may be made.* Where employee sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra hazardous employment, an award for compensation for such injuries may be made in accordance with the provisions of the Act, upon claim made and application filed for same within time required therein.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

These cases have been consolidated and will be considered together.

In the first instance, John Redenbaugh avers that he was employed at the University of Illinois, and was an employee of the State of Illinois, and had been an employee of the State since May 24, 1934; that his wages were fifty-seven and one-half cents per hour, for forty-four hours per week, and that while he was employed in ditching and laying of pipe, on the 16th day of August, 1934, and while in the course of his employment, a piece of pipe which was being laid, struck a street light, causing the globe on said light to fall and cut claimant's arm at his right elbow. Claimant further avers that he incurred a hospital bill at the Burnham City Hospital in the sum of Forty Dollars and Ten Cents (\$40.10), and incurred a doctor's bill in the sum of Forty-one Dollars (\$41.00).

Claimant presented the claim to the University of Illinois and no question of jurisdiction arises upon the record. He claims that he was temporarily totally incapacitated for work for a period of two weeks after the time of the accident.

Claimant is a married man and earns Twenty-five Dollars and Thirty Cents (\$25.30) per week and files his claim for compensation in the sum of Fifty Dollars and Sixty Cents (\$50.60), in addition to his doctor and hospital bills.

It was stipulated that claimant was employed as a laborer from May 24, 1934 to December 11, 1934, at a compensation of fifty-seven and one-half cents per hour and that on August 16, 1934, he suffered an injury to his right elbow, by reason of a twelve inch water main which the claimant was assisting to unload. The pipe rolled down between a tree and a light post, and hit the light post and broke the globe. The globe fell and cut claimant's arm, breaking a blood vessel near the right elbow, and also cut the back of his hand.

Claimant had three children under sixteen years of age.

Claimant contends that he was unable to work for a period of two weeks and has received no compensation whatever, and claims to be still suffering some disability.

The record discloses that the University of Illinois is a corporation created by statute.

Section 8, Paragraph (b) provides: "If the period of temporary total incapacity for work lasts more than six working days, compensation equal to fifty per centum of the earnings but not less than \$7.50 nor more than \$15.00 per week, beginning on the eighth day of such temporary total incapacity and continuing as long as the temporary total incapacity lasts, but not after the amount of compensation paid equals the amount which would have been payable as a death benefit * * *." The claimant in this case received Twenty-five Dollars and Thirty Cents (\$25.30) per week. One-half of this sum is Twelve Dollars and Sixty-five Cents (\$12.65). Paragraph (j) of the same section further provides: "Whenever in this section there is a provision for fifty per centum, such per centum shall be increased five per centum for each child of the employee, including children who have been legally adopted, under sixteen years of age at the time of the injury to the employee until such per centum shall reach a maximum of sixty-five per centum."

Claimant, therefore, would be entitled to Sixteen Dollars and Forty-five Cents (\$16.45) for compensation, not being entitled to anything for the first week, together with his hospital bill in the sum of Forty Dollars and Ten Cents (\$40.10) and his doctor's bill in the sum of Forty-one Dollars (\$41.00),

or a total of Ninety-seven Dollars and Fifty-five Cents (\$97.55).

This same claimant was injured a second time. He received the same amount of compensation as in the first instance, and on the 8th day of October, 1934, while in the course of his employment, he was struck in the right forearm by a pick which was in the hands of Woodrow Wilson, who was also working on the ditch. He alleges that a tendon in the forearm was completely severed, and that this tendon was tied by the attending doctor, and he claims a partial disability resulted.

In this instance his medical bill was Thirteen Dollars (\$13.00), and apparently he had no hospital bill, and he contends that he was temporarily totally incapacitated for work for a period of two weeks after the time of the accident. He now claims to have had five children under the age of sixteen years of age, and claims One Hundred Dollars (\$100.00) for permanent partial disability and Fifty Dollars and Sixty Cents (\$50.60) for total temporary incapacity for work for a period of two weeks, or a total of One Hundred Fifty Dollars and Sixty Cents (\$150.60) in addition to his doctor's bill of Thirteen Dollars (\$13.00).

A stipulation was entered into the effect that claimant was employed as a laborer from May 24, 1934 to December 11, 1934 at a compensation of fifty-seven and one-half cents per hour; that on October 9, 1934, he suffered an injury to his right forearm, and the stipulation is to the effect that at the time of the injury the plaintiff had three children dependent upon him under the age of sixteen years; that he was 46 years of age; that he is a citizen of the United States, and a resident of Champaign County, State of Illinois.

He testified that he was actually struck with a pick in the hands of a fellow worker; that the pick entered his right forearm about half-way between the elbow and the wrist, and that two leaders "popped up." He was asked if this injury broke the skin, and he replied that two leaders "popped up." He testified that he was helped in a truck and taken to the Health Office of the University where he saw Dr. Blackstone, and was sent from there to Dr. Dalton; that Dr. Dalton's bill was Sixteen Dollars (\$16.00), and he testified that as the result of the injury, he was unable to return to work until October 22, and has not received any compensa-

tion. No question arises concerning notice. He testified that the injury still effects his arm; that it feels numb; that at night he wakes up and finds it hurting and has to rub it; that it has poor circulation. He was asked this question by his counsel:

Q. Do you think it makes you somewhat weaker and unable to work as well as you did prior to the injury?

His answer was "Yes."

On cross examination he was asked if he felt that the arm was improving and if there was any change in the condition of the arm, and he answered: "No. I can't say that there is."

Dr. Dalton was called. He was a physician in Champaign County and had been practicing 28 years. He attended the claimant on the 9th day of October, 1934, and treated him for a laceration of the forearm. Dr. Dalton testified that there was a lacerated wound extending beneath the skin; that he did not know of any tendons being exposed, and it was his recollection that the wound extended probably through the fascia; that he treated him until the 23rd day of October, 1934; that he did not think that there could be any permanent disability from a wound of that kind; that the wound extended into the muscle tissue but not the tendons.

Dr. Dalton was asked this question:

"In your experience have you ever known of a case where such an injury might have caused partial permanent disability?"

To this he replied:

"At times it is possible."

In answer to a question put to Dr. Dalton he testified that in his opinion there was no permanent injury.

Dr. J. Howard Beard testified and was questioned by claimant's counsel. Dr. Beard did not examine him at first himself. Claimant came again to the Health Service. This had nothing to do with his treatment. At that time he reported that he was coming along first rate. On November 6, he came in again and was given a form for Dr. Dalton to fill out as required by the Court of Claims. Later on he brought the form back and made a report to the effect that there was no permanent disability. Dr. Beard again examined the claimant on February 26, 1936. He examined the claimant to find out the function and strength of the arm. He first tested the arm to see whether he had proper pronation, supination,

flexion and extension, and found them to be all normal. He then testified that he tested his strength and found that he had strength and range in the action of the muscles of his arms. Dr. Beard gave him further tests and the claimant showed normal power in flexion, and showed better than average strength. Claimant contended that he had been off work for several weeks and then when he started working again he found difficulty in having a good grip, but Dr. Beard did not think that was possible.

Dr. Dalton was again recalled and he testified that he had examined the claimant since he had testified before. The gist of his testimony was that having examined the claimant it was his opinion that the claimant would have the possibility of some slight impairment, but that was merely a possibility. It was the doctor's opinion that there was the same amount of function in both hands, and he couldn't determine any difference in claimant's two arms, and on cross-examination, Dr. Dalton testified that claimant had good use of the arm, and he thought it would remain the same. It affirmatively appears that subsection 7½ of Sec. 3 of the Workmen's Compensation Act applies herein and the work in which plaintiff was engaged at the time of both his injuries, was "an enterprise wherein sharp-edged cutting implements were used." He is therefore entitled to the benefits of said Act, under the authority of the case of *Forest Preserve vs. Ind. Comm.* 357 Ill. 389.

In this state of the record no allowance can be made for any permanent disability.

Figuring compensation as was done in No. 2582, the claimant would only be entitled to one week's compensation for the second injury, or Sixteen Dollars and Forty-five Cents (\$16.45), to be paid in the same manner as the prior claim, plus the doctor's bill in the sum of Thirteen Dollars (\$13.00), plus Ninety-seven Dollars and Fifty-five Cents (\$97.55) for items due in connection with the first injury as heretofore enumerated.

All of the money so found to be due the claimant herein is for temporary total disability and hospital and medical expenses and items incidental thereto, and are payable from the appropriation made under Senate Bill No. 483 from the "University of Illinois Revolving Fund," (Senate Bill No. 482, Sess. Laws, 1937 p. 239—No. 8), in the usual manner of disbursements therefrom, by the University authorities.

(No. 2587---Claim denied.)

WILLIAM MOORE, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 25, 1938.

ALEXANDER WHITE, JR., for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

LIMITATIONS—Section 10 of Court of Claims Act—when claim barred by. Where it conclusively appears from the pleadings and evidence that claim was not filed within the statutory limitation of five years after same first accrued, and that claimant was not under any disability at any time, the court is without jurisdiction to make award and motion to dismiss will be allowed.

MR. JUSTICE LINSKOTT delivered the opinion of the court:

William Moore a soldier in the late war filed a petition with the clerk of this court setting forth that on the 18th day of January, 1924, the State of Illinois was indebted to him in the sum of Three Hundred Dollars (\$300.00) by virtue of an Act entitled "An Act to provide payment of compensation to certain persons who served with the military or naval forces of the United States in the recent war with Germany," approved May 3, 1921.

Claimant charged that on January 8, 1924, the proper state officer issued a draft and mailed it to him at Willow Springs, Illinois, at which time claimant was not living there. This draft was for the sum of Three Hundred Dollars (\$300.00) and was issued to him in payment for military services. The draft was cashed and returned to the State Treasurer and bore the signature of William Moore and also the signature of a man named John T. Allison. Moore claims that he never received the draft and that no other person has any rightful interest in the draft, and he asks an award from this court in the sum of Three Hundred Dollars (\$300.00), plus interest at 6% per annum, from January 8, 1924, and the claim is based upon the equity and good conscience doctrine.

The claim is properly sworn to and evidence was taken. The evidence is quite convincing that somebody forged Moore's name to the draft. The name John T. Allison also appears on the draft and it is not claimed that that was a forgery. It appears that Allison is a man of some property, but nothing in the record disclosed why demand was not made

upon Allison, who subsequently died, or upon his estate, but the claim was not filed until January 31, 1935, more than eleven years after Moore claims the payment was due him.

The Attorney General contends that this court does not have any jurisdiction because it is barred by Section 10 of the Court of Claims Act, which provides as follows:

"Every claim against the State cognizable by the Court of Claims, shall be forever barred unless the claim is filed with the secretary of the court within five years after the claim first accrues, saving to infants, idiots, lunatics, insane persons and persons under disability at the time the claim accrued two years from the time the disability is removed."

The evidence does not disclose that Moore was under disability of any kind. This court, therefore, has no jurisdiction to enter an award in this instance and for that reason, the claim is hereby dismissed.

(No. 3069—Claimant awarded (\$63.02.)

RUTH RATLIFF, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 25, 1938.

Claimant, pro se.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made under.* Where it is found that employee of State, sustained accidental injuries, arising out of and in the course of her employment while engaged in extra hazardous employment, an award for compensation for same may be made in accordance with the provisions of the Act, upon compliance with the terms thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

On October 29, 1936 claimant was engaged in the performance of her duties as a house mother at one of the cottages of the Illinois Soldiers' and Sailors' Children's School, Normal, Illinois. On the day stated while attempting to discipline one of the children, a scuffle ensued in which the little finger of claimant's left hand was broken. Immediate medical attention was given and claimant submits that the fracture was properly cared for, but a contracture developed and resulted in Claimant's finger being stiff, and as she alleges it is practically useless in the performance of the duties required of her, and in the use of her hand in her former occu-

pation as a radio performer in playing a guitar. In attempting to obtain relief from the injury, claimant spent one week at the Research and Educational Hospital in Chicago, under the care of Dr. H. B. Thomas, and she seeks reimbursement for railroad fare and expense in connection therewith of \$17.55 and \$25.00 for medical care rendered to her by Dr. Ray W. Doud, of 205½ North Street, Normal, Illinois, in addition to an award for specific disability for the loss of use of her finger.

The respondent submits as the first question, whether the employment of claimant was of such a nature as to bring her under the benefits of the Workmen's Compensation Act. Under the previous rulings made by this court as to similar employments in similar institutions, and under the evidence appearing in the record, we find that Respondent was operating said institution and that claimant was employed within the terms of the Workmen's Compensation Act; that the accident arose out of and in the course of her employment, and that she is entitled to the benefits of said Act. At the time of the accident claimant was receiving a salary of Fifty (\$50.00) Dollars per month and a maintenance allowance of Twenty Four (\$24.00) Dollars per month. The claim was filed within five months after the date of the accident. Claimant was necessarily absent from work as a result of said injury for twelve (12) days, and received full pay for that period. Under Section 8 (d) of the Act, an injured employee is entitled to compensation for total temporary incapacity from the day following the injury, only in case such total temporary incapacity lasts for a period of more than thirty (30) days thereafter. In the present instance such temporary total incapacity only lasted for twelve (12) days, and under Section 8 (b) claimant would not be entitled to compensation for the first seven days. She was therefore entitled to receive compensation for only five-sevenths (5/7) of a week, figured on the basis of \$8.54 per week compensation, making \$6.10 for the time she was disabled. During this period of twelve (12) days she received her wages in full, which on the basis of \$17.08 per week amounted to \$29.28, part of which was in cash and part in maintenance. Allowing her maintenance during the entire period of disability, she would have been entitled to \$6.10 compensation and \$9.49 maintenance, or a total of \$15.59. Having received cash and maintenance

of \$29.28 for such period, she has received an over-payment therefor of \$13.69, which amount should be deducted from any award now to be made. Under Section 8 (a), providing for necessary first-aid, medical and surgical services, an allowance should be made for the \$25.00 medical bill and for the sum of \$17.55 necessarily expended in obtaining such care. The record does not disclose that claimant had any dependent children under sixteen years of age at the time of the injury, and compensation is based upon one-half of an average weekly wage of \$17.08, or \$8.54 per week. Claimant contends that her little finger on the left hand is totally and permanently disabled, but except for her own statement, the most favorable testimony for claimant as to the loss of use of her fourth or little finger is that of Dr. Ray W. Doud who testified that the stiffness or ankylosis of the finger joint limits the extension of the finger to about forty-five (45) degrees; that such condition is permanent, and that the disability results in about twenty (20) per cent loss of use thereof.

The compensation to be paid under the Act for the complete loss of use of such finger is on the basis of twenty (20) weeks. Under Section 8 (d) 7, she would be entitled to twenty (20) per cent loss of use of such finger, or to one fifth (1/5) of twenty (20) weeks, or four (4) weeks times fifty (50) per cent of her average weekly wage, or \$34.16. Deducting the \$13.69 over-payment of temporary total disability leaves a balance of \$20.47 in claimant's favor.

An award is hereby allowed in favor of claimant for the said sum of \$20.47; also for \$17.55 expenses incurred in connection with medical treatment, making a total of \$38.02, and a further award to claimant for the use of Dr. Ray W. Doud, for medical services, in the sum of \$25.00.

The full amount of such compensation has heretofore accrued, and is payable in full at this time.

This award being subject to the provisions of an Act entitled, "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," approved July 3, 1937 (Sess. Laws 1937, p. 83), and being, by the terms of such Act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from said appropriation from the General Revenue Fund in the manner provided for in such Act.

(No. 3916—Claimant awarded \$4,999.99.)

LEONA MURRAY, WIDOW OF B. WARREN MURRAY, DECEASED, Claimant,
vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 25, 1938.

CASSIDY & KNOBLOCK, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR,
Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award for compensation for death may be made under.* Where it appears that employee of State, sustains accidental injuries, resulting in his death, arising out of and in the course of his employment, while engaged in extra hazardous employment, an award for compensation may be made in accordance with provisions of Act, to one legally entitled thereunder, upon compliance with the terms thereof.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This case was filed by Leona Murray, widow of B. Warren Murray, deceased, and alleges that B. Warren Murray, her husband, was employed by the State of Illinois, from the 24th day of April, 1934, as Junior Engineer in the Division of Highways, Department of Public Works and Buildings, until the time of his death on September 18, 1936; that for more than one year prior to September 18, 1936, decedent had received a salary from the State in the sum of One Hundred Fifty Dollars (\$150.00) per month; that on the 17th day of September, 1936, he had an appointment at eight o'clock A. M. at the Mac Asphalt Company, McCook, Illinois, to inspect the mixing of mackasphalt, which was to be used upon a certain State highway at Sterling, Illinois; that he left his home about seven o'clock in the morning and about seven thirty o'clock in the morning, he collided with a truck at the intersection of Ninety-fifth Street and Harlem Avenue, Chicago, Illinois; that the truck was driven by Julius Caskasy, who lived at 1313 Van Buren Street, Gary, Indiana; that the decedent was removed from the scene of the accident and taken to the Little Company of Mary Hospital, where he died at noon on the following day; that a coroner's jury returned a verdict of accidental death.

Claimant further alleges that decedent was employed as inspector of miscellaneous materials, and went from place to place where his services were needed, especially on asphalt;

that Julius Caskasy carried no public liability insurance and has no financial standing.

The State paid Drs. M. A. Dolan, and Eric Oldberg of Chicago for medical services and paid the hospital fees, for expenses incurred between the time of the accident and his death; and also, one S. W. Steen of Chicago was paid for nursing services.

The facts are all stipulated.

The duties of the decedent were directly connected with and a part of the construction of the highway. He inspected and examined materials which were used in the construction of highways, and he also inspected, and examined highways in the course of their construction, and at the time of his death he was enroute to make an inspection at the Mac Asphalt plant at McCook, Illinois, of certain materials which were to be used in the construction and building of certain highways for the State.

For several years the State of Illinois has been engaged in the enterprise or business of maintaining and repairing its hard-surfaced, concrete highways. In this respect the State of Illinois comes under the Workmen's Compensation Act because in this work its employees in so performing their duties in repairing and maintaining hard-surfaced concrete highways and in constructing highways used and manipulated sharp-edged cutting tools and implement, such as spades, shovels, picks, and moving machines which have sharp-edges; and also employed numerous truck drivers.

Forest Preserve District of Cook County vs. Industrial Commission, et al. 357 Ill. 389;

The City of Rock Island vs. Industrial Commission, et al. 287 Ill. 76.

In this case actual notice was given to the State on the day of the accident and the claim was filed within apt time.

The claim is made for \$4,000.00 compensation; \$50.00 doctor bill, \$23.62 hospital bill, \$21.00 nursing and \$425.00 funeral expenses. There is no provision in the law for us to allow the payment of funeral expenses and that part of the claim is denied.

This court has held and also the Supreme Court of the State of Illinois that the construction and maintenance of a hard-surfaced paved public highway is the maintenance and

construction of a structure under the Workmen's Compensation Act.

City of Rock Island vs. Ind. Com. 287 Ill. 76, 79;

Bond vs. State, 7 C. C. R. 198, 199;

Pennington vs. State, 7 C. C. R. 253, 255.

There appears to be no dispute that the decedent at the time of the accident was an employee of the State; that notice was had by the State and the claim was filed within six months after the accident. He was apparently employed on State highway maintenance and construction work and was under the provisions of the Act as previously decided by this court.

Under Section 7a of the Workmen's Compensation Act, if the employee leaves any widow, child or children whom he was under legal obligations to support at the time of his injury, a sum equal to four times the average annual earnings of the employee, but not less in any event than two thousand five hundred dollars, and not more in any event than four thousand dollars, shall be allowed. His annual earnings were \$1,800.00 per year. He left no child under sixteen years of age, and all doctor and hospital bills have been paid.

An award, therefore, in the sum of Four Thousand Dollars (\$4,000.00) is made to claimant, payable at the rate of Fifteen Dollars (\$15.00) per week from the time of his death.

Accrued compensation is as follows: from September 18, 1936 up to March 4, 1938, being 76 weeks, the sum of One Thousand One Hundred Forty Dollars (\$1,140.00) now payable; the balance to be paid at the rate of Fifteen Dollars (\$15.00) per week. Any right to receive money hereunder, shall be extinguished by the re-marriage of the widow.

This award being subject to the provisions of an Act entitled, "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," approved July 3, 1937 (Sess. Laws 1937, p. 83), and being, by the terms of such Act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from the appropriation from the Road Fund in the manner provided for in such Act.

(No. 3927. Claim denied.)

CASPER SIEKMANN, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 25, 1938.

TURNER, HOLDER & ACKERMAN, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREYOR, Assistant Attorney General, for respondent.

DEDICATION OF PROPERTY FOR PUBLIC USE—*effect of deed of*. Where private property, is acquired by deed of dedication, for purpose of construction of public road containing release of damages to land not taken as result thereof, instead of by condemnation, the payment of the consideration agreed upon, has the same effect as the assessment of damages in condemnation proceedings and includes damages to property, not conveyed under deed, which results from proper construction of said road, and all past, present and future damages which the improvement may thereafter reasonably produce.

SAME—*damage to part of not acquired by deed of—claimed as result of public improvement—improvement constructed in accordance with plans submitted to grantors in deed—when award for denied*. Where claimant by deed of dedication conveyed a portion of his land to State for purpose of construction of public road thereon containing release of damages to land not taken, as result thereof, and plans and specifications therefor are submitted to grantors before execution thereof, and road is properly constructed in accordance therewith, the conveyance will be held to be a release of all damages, which would be presumed to be included in the amount of damages, if the property had been condemned, and the grantors cannot recover for any damages to the remainder of their land, which result from the proper construction of the road, or the maintenance of same and an award for same must be denied.

NEGLIGENCE—*acts of independent contractor—State not liable for*. The State is not liable for damages occasioned by the negligence of persons, in the performance by them of contracts entered into with it.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant is the owner of a small triangular tract of land situated at the intersection of S. B. I. Routes 12 and 157 at French Village in St. Clair County, said premises being improved by a one-story frame dwelling house with tar-paper roof and sides, and by a filling station.

The original Route 157 extends in a northerly and southerly direction a short distance east of claimant's property. S. B. I. Route 12 extends in an easterly and westerly direction just south of claimant's premises, and formerly intersected said S. B. I. Route 157 at grade. Some time prior to February 4th, 1936, the Department of Public Works and

Buildings, Division of Highways, decided upon a grade separation, and plans and specifications were prepared for the elevation of S. B. I. Route 157 so that it would cross said Route 12 and several railroad tracks immediately adjoining said Route 12 on the south, at an elevation of about twenty (20) feet above the level of the ground on which claimant's property was located. Such elevated roadway was constructed a short distance west of the original S. B. I. Route 157 and adjoins the premises of the claimant on the west; in fact, a portion of the west side of claimant's premises were taken for right-of-way purposes for the construction of such elevated roadway.

There are some bluffs to the north and east of claimant's property, and prior to the construction of such elevated roadway, the surface drainage from the bluffs was over claimant's property to the west. As the result of the construction of such elevated roadway along the west side of claimant's property, such property was left in a pocket.

On July 18th, 1936 a very unusual rainstorm occurred, something in the nature of a cloudburst, which lasted for about thirty minutes. The water from the bluffs flowed onto claimant's property in large quantities, and on account of the construction of the aforementioned elevated roadway, it did not flow off as usual, but accumulated to the depth of ten or twelve inches on claimant's property. When the water subsided a large amount of mud and silt was left on claimant's premises, whereby he claims that his property has been damaged to the extent of \$335.00.

Prior to the construction of such elevated roadway, claimant had a tile drain running in a southwesterly direction from his property under S. B. I. Route 12, but in the course of the construction of such elevated roadway, said tile drain was broken by the continual passing thereover of the heavy trucks of the several contractors and the public, so that it was not operating at the time of the aforementioned rainstorm.

On or about February 4th, 1936 claimant and his wife, by quit-claim deed, for the consideration of \$1,748.00, conveyed to the County of St. Clair, for public road purposes, a tract of land off of the west side of the premises then owned by him. After the description of the real estate conveyed, such deed contained the following provision: "All the above

being situated in the County of St. Clair, in the State of Illinois, hereby releasing all claims to damages to land not taken, owned by the grantors, by reason of the construction and maintenance of said public road." The work of construction was commenced in March, 1936, and continued during practically all of such year.

The plans and specifications for the construction of such elevated roadway were examined by claimant before he executed the deed in question. He states that such plans contained no provision for the construction of a tile drain; and admits that he forgot about that matter when he made the deed. He states that after the work of construction commenced, but before the aforementioned rainstorm, he complained to the representatives of the respondent in charge of the work, about the absence of a tile drain, and was assured that the matter of drainage would be taken care of when the work was completed; also, that a tile drain was constructed after the heavy rain of July 19th, and that he has had no difficulty with surface water since that time.

The complaint herein is based upon the negligence of the servants and employees of the respondent in the construction of the elevated roadway in question, but claimant afterwards shifted his position, and now bases his right of recovery on Article 2, Section 13 of the Constitution.

The Attorney General contends that the construction of the elevated roadway in question was a governmental function, and that the respondent is not liable for the negligence of its servants and agents in connection therewith; also, that the claimant is barred by the provisions of his aforementioned deed and release from the recovery of any damages to property not taken.

In reply to such contentions, claimant states:

"It is our contention that the compensation as paid did not include any damages that arose subsequently out of the construction of this public improvement."

This court has held in numerous cases that in the construction of its hard-surfaced highways, the State is exercising a governmental function, and that in the exercise of such functions, the State is not liable for the acts of its servants and agents. However, where private property is taken for public use without just compensation, in violation of Section 13, Article 2 of the Constitution, another question is pre-

sented, and notwithstanding the position taken by claimant in his complaint, we will consider his claim in the light of the aforementioned constitutional provision.

It is apparent that claimant's right to an award depends upon the legal effect of the deed and release in evidence. It is well settled in this State that where there is a deed of conveyance, the legal effect of such deed is the same as a judgment in condemnation. The consideration for the deed constitutes a release of all damages, including damages to property not conveyed, which results from the proper construction of the road in question. *C. R. I. & P. Ry. Co. vs. Smith*, 111 Ill. 363; *Atterbury vs. C. I. & St. L. Ry. Co.*, 134 Ill. App. 330; *Watkins vs. State*, 6 C. C. R. 172; *Lampp vs. State*, 6 C. C. R. 342; *Baber vs. State*, No. 2221, decided December, 1935.

In Lewis on Eminent Domain, Second Edition, page 705, Section 294, the rule with reference to a release is set forth as follows:

"A release of damages has the same effect as the assessment and payment of damages under the statute."

As to the effect of a judgment in condemnation, our Supreme Court in the case of *C. R. I. & P. Ry. Co. vs. Smith*, *supra*, on page 371, in a case similar to the case at bar, said:

"The rule is, that the appraisal of damages in a case of condemnation embraces all past, present and future damages which the improvement may thereafter reasonably produce."

The rule there laid down is in accordance with the previous, as well as many subsequent decisions of such court.

In the case of *C. & A. R. R. Co. vs. J. L. & A. Ry. Co.*, 105 Ill. 388, the court, on page 394, said:

"Since the decision in the case of *Jacksonville and Savanna R. R. Co. vs. Kidder*, 21 Ill. 131, the practice has always been, in condemnation cases, to admit in evidence the plans of the work proposed to be done or the land taken, otherwise it could not be so well known how the projected improvement would affect the residue of the property. It is practicable, of course, to so construct a public improvement as to make it of greater or less damage to the land over which it passes, and the extent of such injury cannot be justly estimated unless the character of the work to be done shall be first ascertained from plans and specifications that shall be thereafter adhered to by the corporation condemning the land to its use."

* * * * *

Any marked departure from the plans, as shown in the profile submitted, or from the stipulation in evidence, as to the character of the work to be done, would subject the corporation making the condemnation to an action for damages, in favor of the land owner."

In the case of *C. P. & St. L. Ry. Co. vs. Brinkman*, 47 Ill. App. 287, the court, on page 291, said:

"Therefore we hold if a road is constructed in accordance with the profile offered in evidence on condemnation proceedings, and no change is made in the plans and profiles so offered, then no recovery can be had in an action on the case by reason of a mistake of the jury in determining the amount of damage, or by reason of a failure to allow a sufficient sum as damage to contiguous lands or a compensation for lands taken, nor by reason of a wrong description of the profile where it is open alike to be described by witnesses offered by the railroad company or by the land owner, and all damages consequent on the construction of the road in accordance with the implied agreement made by the company that it would be constructed according to the profile, when it is so constructed, are by the condemnation proceedings *res judicata*."

The claimant examined the plans and specifications before he executed the deed and release, and consequently, at the time of such execution, he was in possession of all of the facts with reference to the location of the roadway in question, the height of the elevation, the extent of the fill, as well as the fact that such plans made no provision for surface drainage from claimant's property. Claimant had owned such property for a considerable period of time and was familiar with the lay of the land and the direction in which the surface waters naturally flowed. He must have known therefore that one of the principal items of damage to the property not taken would be the damage resulting from the obstruction to the flow of the surface waters in their natural course. Knowing such facts, and having executed his deed and release with the full knowledge thereof, he is barred from recovering any damages resulting from the construction of the roadway in accordance with such plans and specifications.

The deed and release must be considered as having been based upon the construction of the improvement in accordance with the plans and specifications. If the improvement in question was constructed in substantial accordance with the plans and specifications, claimant is barred from the recovery of any further damages, for the reason that all damages resulting from the construction of the improvement in accordance with the plans and specifications must be considered as having been within the contemplation of the parties at the time of the execution of the deed and release.

It is true that a tile drain which had previously extended from claimant's property across Route 12 had been broken

by the continual passage thereover of the trucks owned by the several independent contractors who were working on the construction of the improvement, and by the public generally, but the State cannot be held responsible for the actions of any independent contractor. If any liability resulted therefrom, such liability is on the part of the contractor causing the damage and not upon the State.

There is nothing in the record which indicates that there was any substantial departure from the original plans, and under the facts and the law as above set forth, claimant is barred by his aforementioned deed and release, from any further recovery for the damages set forth in the complaint, and award must therefore be denied.

(No. 3144—Claimant awarded \$26.05.)

ALICE E. PELIKAN, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 25, 1938.

Claimant, pro se.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

MONEYS ADVANCED ON BEHALF OF STATE—*lapse of appropriation—when credit for reimbursement will be made.* Where it clearly appears that employee of State, in the performance of her duties and under the authority of proper State authorities, expended moneys for the use and benefit of the State, an award may be made for reimbursement therefor.

MR. JUSTICE LINSBURY delivered the opinion of the court:

This claim is for the sum of Twenty-six Dollars and Five Cents (\$26.05) for expenses incurred by claimant while acting in her official capacity as Secretary of the Illinois Board of Pharmacy, Division of Registration, Department of Registration and Education. Claimant alleges that she was a member of the Illinois Board of Pharmacy, acting at the request of the Department of Registration and Education, in attending Board Meetings and conducting examinations in Chicago, Illinois, during the period of time in which expenses were incurred, to-wit: March and June, 1937. It is further alleged that these expenses were incurred in the furtherance of the duties of claimant for the use of the State of Illinois, and at its request.

A stipulation of facts was entered into by the claimant and the Attorney General. She filed a proper Bill of Particulars showing itemized statement of expenses, with the Department of Registration and Education, but the same was not filed until after the appropriation had lapsed.

No question arises about the facts. The stipulation discloses that the services were rendered; that she was authorized and directed to render these services by the proper State authorities, and we have held that where claimant has rendered services or furnished supplies to the State on the order or request of an official authorized to contract for the same, and submits a bill therefor within a reasonable time, and due to no negligence or fault on the part of claimant, same is not approved and vouchered for payment before the appropriation from which it is payable lapses, an award for the reasonable and customary value of the services or supplies will be made where, at the time the expenditure was incurred, there were sufficient funds remaining unexpended in the appropriation to pay for the same. The stipulation shows that there were sufficient funds remaining unexpended in the appropriation for this purpose at the time the services were rendered.

We are of the opinion that the claimant should be reimbursed for the money she has expended, and, therefore, will make an award to her in the sum of Twenty-six Dollars and Five Cents (\$26.05).

(No. 3158—Claim denied.)

NILES SMOTHERS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 25, 1938.

EVERETT LEWIS and R. E. SMITH, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MULNEE, Assistant Attorney General, for respondent.

ILLINOIS NATIONAL GUARD—organization and maintenance of governmental function—negligence of officers or members of in leaving explosives exposed to public—personal injuries resulting therefrom—State not liable for. The facts in this case are the same as those in *Day vs. State*, No. 3159, supra, and the opinion in that case is controlling herein.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This claim was filed on the 8th day of December, 1937, in the office of the clerk of this court, and sets forth a claim

based on the same alleged cause of action as was stated in the case of *Charles Day vs. State of Illinois*, No. 3159, with the exception that in this case it was alleged that on the 22nd day of August, 1937, a shell or bomb, the exact and correct name for the same being unknown to the claimant, was picked up from the ground upon, at or near the Rifle Range mentioned in the Day complaint, and given to one, Charles Day, and while the said Charles Day was using due care and caution for his own safety to the best of his knowledge, the said shell or bomb exploded in the hand of said Charles Day, and the claimant, being within a few feet of said Charles Day, and also in the exercise of due care and caution for his own safety, was injured, to the damage of the claimant in the sum of One Thousand Dollars (\$1,000.00).

It was not alleged that Charles Day was an officer or agent of the State of Illinois, or that the claimant had any right to be upon the premises where he was; and what is said by the court in the Day case, applies with equal force in this case.

The motion of the Attorney General, will, therefore, be allowed and the case dismissed.

(No. 3193—Claim denied.)

RALPH BAKER, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 25, 1938.

FRANK P. NORTH, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

ILLINOIS NATIONAL GUARD—negligence of member of—damage to property as result of—State not liable for. In the organization and maintenance of the Illinois National Guard the State exercises a governmental function, and is not liable for damages to property resulting from the negligence of the officers or members thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

The Claim of Plaintiff herein presents a situation which causes the court to wish that it had arbitrary discretion in the allowance of claims. The record discloses that claimant, on August 13, 1937, was the owner of a Ford sedan; that during the night of the date stated the automobile was parked

on one of the streets in Rockford, Illinois; that while so parked, one Sergeant Costello, then and there assigned to Military Police duty in connection with summer maneuvers of the Illinois National Guard, backed a State owned automobile which he was driving, into the front part of claimant's car, resulting in damages to the fenders and hood which were repaired at a cost of \$42.76. The claim was submitted to the attention of a Board of Officers of Headquarters Special Troops, 33rd Division, who found, "That the driver of the Government vehicle was responsible for the accident and recommended allowance of the claim for \$42.76." Claimant was notified that the report was being submitted to Carlos E. Black, Adjutant General of Illinois, and on November 18, 1937 the latter notified claimant as follows, "Report of the Board of Officers . . . indicate that this accident occurred through no fault of yours. This Department is not permitted by law to make payment for damages. Any claim that you might have should be submitted to the Court of Claims." Plaintiff thereafter filed his claim on January 27, 1938, and the Attorney General has filed a motion to dismiss, for the reason that the claim discloses on its face that it is predicated upon the alleged negligence and carelessness of one in the service of the State, and that under the law, the State cannot be held liable for damages resulting from the negligence or wrongful acts of its officers, agents, servants or employees, and the Doctrine of Respondent Superior does not apply to the Sovereign State.

The contention made by the Attorney General must be sustained, and the claim dismissed, but the Court cannot refrain from indicating its view that further effort should be made by those in authority over Sergeant Costello in holding him responsible for the damages that have heretofore been shown before the Military Board to have resulted from his negligence.

The motion to dismiss is sustained and the claim dismissed.

— — — — —
(No. 3186—Claim denied.)

FORD MURRAY DECKER, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 25, 1938.

Claimant, pro se.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

COURT OF CLAIMS - claim for order on State Auditor to deliver State Warrant - Court without jurisdiction to enter. The Court of Claims has no jurisdiction to enter an order compelling State officers to deliver a warrant for soldier's bonus to claimant, and if claimant has right to same he must assert same in courts of general jurisdiction.

SAME - remedy in courts of general jurisdiction, precludes jurisdiction of. The Court of Claims has no jurisdiction where claimant has a proper remedy in courts of general jurisdiction.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein seeks an order of this court, directing that the Auditor's Office deliver to him Illinois State Warrant No. 338139, for \$100.00, heretofore issued payable to "Napoleon Bross Decker" but withheld from delivery to the latter for the apparent reason that no address had been provided to which it could be sent. A report from the Hon. C. N. Black, Adjutant General of Illinois, states that Tracy Kilpatrick Decker, a World War Veteran, was killed in action in France in June, 1918. A claim for the Illinois bonus was filed under No. 252343 and \$300.00 was allowed thereon to be divided equally between his two brothers and sister, i. e. Ford Murray Decker, Napoleon Bross Decker and Margaret Decker Shols. Illinois Warrant No. 338138, for \$100.00, was delivered to and cashed by Ford Murray Decker. Warrant No. 338139 for \$100.00, was not forwarded to the payee Napoleon Bross Decker, for the reason that he apparently provided no address to which it could be sent. Voucher No. 5312 of the State Treasurer's records carries the following notation, "Hold check for address." This Warrant is still held in the files of the State Auditor.

Claimant bases his claim on the following purported fact, i. e. that his brother Napoleon Bross Decker assigned to him his claim to the said \$100.00.

The Adjutant General's report states that the purported assignment was made and is held in the Adjutant General's Office. That it was supposedly signed and sworn to on March 4, 1930 in Cook County, Illinois, and that the said Napoleon Bross Decker was then a resident of Bridgeport, Connecticut. That such assignment was some three months after Ford Murray Decker had stated to that office that he was the sole

heir of Tracy Kilpatrick Decker. The Adjutant General's Office notified claimant herein on March 6, 1930 that the assignment or waiver in question was illegal.

The Attorney General has filed a motion to dismiss the present claim and denies the right of this court as a matter of jurisdiction to issue an order commanding the Auditor's Office to issue said warrant; it being the contention of the Attorney General that if claimant is legally entitled to said warrant he has a remedy in the courts of general jurisdiction; further, that claimant's complaint shows upon its face that his claim at this time is barred by the statute of limitations.

We are of the opinion that the objection as to the jurisdiction of the court to grant relief in the nature of an injunction or mandamus must be sustained. The Court of Claims has no authority to enter an order compelling State officers to deliver a warrant. Recourse of such nature must be had by claimant in the Civil Courts.

Where claimant has a complete and adequate remedy at law the Court of Claims will not take jurisdiction. (*Mohawk Carpet Mills vs. State*, 8 C. C. R. 37.)

As jurisdictional rights are not being taken by the Court of Claims, it is not essential to pass upon the other questions raised.

The motion of respondent to dismiss the application is allowed and the claim dismissed.

(No. 2528—Claim denied.)

TONY DEBEVEC, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 25, 1938.

MAX PRZYBORSKI, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

HIGHWAYS—*construction and maintenance of, governmental function.* The State exercises a governmental function in the construction and maintenance of public highways, and is not liable for damages caused by either a defect in the construction, or failure to maintain same in a safe condition.

NEGLIGENCE—*failure to maintain highway in safe condition—State not liable for negligence of its employees—doctrine of respondent superior not applicable to State.* The doctrine of respondent superior not being applicable

to it, the State is not liable to respond in damages for the negligence of its employees in failing to maintain highway in a safe condition for travel, unless there is a statute creating such liability and in the State of Illinois, there is no such statute.

MR. JUSTICE LANSFORD delivered the opinion of the court:

This is a suit at common law filed on the 26th day of October, 1934, and alleges that on the 17th day of April, 1934, the claimant was operating a motorcycle in a southerly direction along and upon State Route No. 68, between Washington Street and Belvidere Road, presumably Cook County. It is charged that the State negligently and carelessly permitted the West half of the highway known as State Route No. 68 to be and remain out of repair and become broken and depressed, thereby causing deep holes to be and remain in that part of the highway customarily used by traffic moving in a southerly direction; that the highway was uneven, rough and unsafe for traffic, and of this condition respondent had notice of the situation for a long time prior to the date of the accident.

Claimant further averred that there were no warning signs to apprise the claimant of the situation, and that while he was driving a motorcycle, using due care for his own safety, he ran upon, over and into the rough, uneven and depressed portion of the highway and thereby sustained an injury; that he was thrown upon the highway with great force and violence by reason of which his right leg was fractured and other parts of his body were cut and bruised.

A Bill of Particulars was filed for doctor's bill, hospital bill, loss of time from his employment and for pain and suffering, totalling \$579.75. A motion to dismiss was filed on behalf of the Attorney General, and for legal reasons this motion must be sustained and no comment will be made upon the evidence.

This court has repeatedly held that:

"In the construction and maintenance of its roads, the State acts in a governmental capacity and in the exercise of such governmental functions it does not become liable in actions of tort by reason of the malfeasance or negligence of its officers or agents in the absence of a statute creating such liability. Such has been the settled decision of this court for many years."

Morrissey vs. State of Illinois, 2 C. C. R. 454; *Minear vs. State Board of Agriculture*, 259 Ill. 549.

"The General Assembly has never enacted a law making the State liable for damages caused by the negligent construction or maintenance of a public road and this court has no power to make an award for damages in the absence of such a statute."

Chandler vs. State of Illinois, 6 C. C. R. 138; *Beckolt vs. State*, 7 C. C. R. 241.

The facts in this case come within the rule mentioned in the decisions above referred to and for the reasons therein stated, the claim will be dismissed.

(No. 3118. Claim denied.)

BERNICE TAMULIS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 10, 1938.

MARTIN WALSH, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MUESE, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT--death resulting from injuries sustained after employment ceased--while on way home from work--not accident arising out of and in course of employment. Where State highway policeman had finished work for the day, and while riding home on motorcycle owned by State at point some distance from his headquarters, ran into rear of truck, receiving injuries resulting in his death, such injuries cannot be said to have resulted from accident arising out of and in the course of his employment.

SAME--same--same--when employer not liable for. As a general rule, employer is not liable under the Workmen's Compensation Act for injuries received by an employee while on the road to or from his employment.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein is the surviving widow of Frank J. Tamulis who was employed by the respondent as a State Highway Policeman. On the 9th day of August, 1937, Frank Tamulis was killed, and his widow files her claim for an award of Four Thousand (\$4,000.00) Dollars, under the terms of the Workmen's Compensation Act, alleging that his death was the result of an accidental injury arising out of and in the course of his employment by the State.

From the evidence herein it appears: That Mr. Tamulis was a police officer of the State of Illinois, with headquarters at 123rd & Cicero Ave., Chicago, Illinois, and residing at 4924 S. Honore St., Chicago. His patrol section was the South-

west Highway. On August 9th, 1937 he worked on the patrol shift from 4 o'clock in the afternoon until 12 o'clock midnight. When relieved from duty he started home, using a police motorcycle for such purpose. About 12:30 A. M. at a point approximately one and one-half blocks East of Cicero Avenue, on S. B. I. Route No. 7, he drove the motorcycle into the rear of a Model T Ford truck, then being driven along the highway in the same direction that he was traveling. The truck was fully equipped with proper lights, but the night was somewhat foggy. The driver of the truck felt the impact, stopped his truck and walked back to determine the cause and found the motorcycle and its rider lying on the pavement. Another police officer, Samuel McDowell, of 4241 Drexel Ave., Chicago, testified that he was driving a police squad car on the Southwest Highway east of Cicero, between 12 and 12:30 A. M. on August 9th; that he did not see the actual collision but saw sparks fly through the fog and immediately afterwards reached the body of Officer Tamulis lying on the South lane of the highway; that the driver of the truck came running back and aided in putting Officer Tamulis in another car which took him to the hospital, upon arrival at which he was found to be dead. Officer McDowell further testified that Tamulis had finished his work at 12 o'clock midnight, and at the time of his death was not on duty but was on his way home; that although he was riding a motorcycle, it was not the custom of the officers to take motorcycles home with them and that they had orders that motorcycles were not to be ridden home, and they were only to take them when they had specific instructions to do so. No one testified that Officer Tamulis had any instructions to ride his motorcycle home. One of his associate officers, Frank Webster, testified that he talked with him at the Police Station about five minutes after 12 o'clock on the morning he was killed; that it was time to go home and Frank Tamulis told him they were to go on a funeral detail together the next morning, but Officer Webster further testified that he found out later they were not supposed to go on the funeral detail, and that no permission or authority for same had been made. The only importance of the funeral assignment is that if Tamulis had been ordered to go on such assignment in the morning, it might follow that he had received authority to take the motorcycle home that night. If such was the case we agree with Counsel for Claimant that

although Captain Barnhoft, Commanding Officer of the Station, was absent from the City when the proof was taken in this case, yet there should have been some one who was able to testify as to the facts in regard to this matter, if any such permission had in fact been given.

Even though the record disclosed however that Officer Tamulis had permission to ride the motorcycle home on the morning in question, the circumstances would still not be sufficient to support a finding that the accident in question arose out of and in the course of his employment. The general rule is that a man's employment does not begin until he reaches the place where he is to work and does not continue after he has left. There may be circumstances under which an employee in going to and returning from his place of employment can be held to be in the line of his employment, but such cases are governed and controlled by their own particular facts and circumstances. It definitely appears from the evidence in this case that Officer Tamulis' employment and duty had ceased at 12 o'clock when he left the State Highway Police Station. He had no further duties to perform until he again reported to his superior officer, and regardless of whether he was riding the State-owned motorcycle with or without permission, there are no circumstances in the case which take it out of the general rule, that "An employer is not liable under the Workmen's Compensation Act for injuries received by an employee while on the road to or from his employment." This ruling is supported by the decision of our courts in a long line of cases including *Shegart vs. Ind. Comm.*, 336 Ill. 223. The cases cited by claimant do not bring the circumstances of this case within the exceptions shown in the several cases cited. An award will therefore be denied and the case is hereby dismissed.

(No. 2842 -Claim denied.)

WALTER J. WOLF, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 10, 1938.

ODE L. RANKIN and BEN A. STEWART, for claimant.

OTTO KEENER, Attorney General; JOHN KASSLEMAN, Assistant Attorney General, for respondent.

Highways—construction and maintenance of, governmental function—negligence of employees of State in connection therewith—State not liable for damage to property as a result of guard on grounds of equity and good conscience cannot be made regardless of degree of. The facts in this case are similar to those in *Gorbett, Admr. vs. State*, No. 2246, supra, and the opinion in that case is decisive herein.

MR. JUSTICE LANSFORD delivered the opinion of the court:

The claimant charges that his automobile was being driven and operated by his father, Charles J. Wolf, on January 6, 1936 at about 9:45 A. M. on Washington Boulevard at and near Lathrop Avenue in the Village of River Forest, Cook County, Illinois, and at that time a truck owned by the State Highway Department and operated by one of its employees was being operated in the same direction as his automobile; that the truck suddenly swerved to the left without signalling the driver of the automobile, and ran into and struck the automobile to plaintiff's damage in the sum of approximately One Hundred Dollars (\$100.00).

The Attorney General filed a motion to dismiss this cause for the reason that it sought to recover damages sustained by the automobile of claimant in a collision with a truck owned and operated by the Division of Highways, it being alleged that such collision was the result of the negligence and carelessness of the driver of the truck, who was an employee of the Division of Highways, and therefore the State is not liable for such damages.

The Attorney General filed his brief and therein stated that as a proposition of law the State is not liable for damages to property caused by the negligent and careless operation of one of the trucks by its employee, the doctrine of respondent superior not being applicable to the State, and cited

Wetherholt vs. State, 8 C. C. R. 100;

Trompeter vs. State, 8 C. C. R. 141;

Unverfehrt vs. State, 8 C. C. R. 577.

The claimant filed a brief in opposition wherein it is contended that this claim comes within the exception to the general rule relied upon by the Attorney General in support of his motion to dismiss. However, they say in their brief that "the general rule is well established that the doctrine of respondent superior does not apply to the State in the exercise of its governmental functions," and then argue that this court

has recognized exceptions to the general rule of non liability where the injuries complained of are directly attributable to grossly reckless wanton or wilful acts on the part of a servant of the State and the claimant is free from all contributory negligence in connection with the injury.

It is also argued that this claim should be allowed on the grounds of equity and good conscience.

This court has had occasion and has passed upon the liability of the State in cases of this kind, many, many times, and we have held that such liability does not exist. Several years ago there were a large number who felt that a distinction should be made in cases where an employee of the State had been guilty of gross negligence and caused damage to another when such injured person had been entirely free from negligence. At two different times bills were introduced in the legislature to correct this situation, but neither time did either bill become a law, so it may be said that the public policy of Illinois so far as this rule is concerned, is pretty well established.

In this case, counsel rely upon equity and good conscience rule.

In *Crabtree vs. State of Illinois*, 7 C. C. R. 207, we held that the provisions of paragraph 4 of Section 6 of Court of Claims Act with reference to equity and good conscience merely defines the jurisdiction of the court and does not create a new liability against the State nor increase or enlarge any existing liability and limits jurisdiction of court to claims under which State would be liable in law or equity, if it were suable, and where claimant fails to bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure one.

The motion on behalf of the Attorney General to dismiss will, therefore, be sustained and cause dismissed.

(No. 3108—Claimant awarded \$99.29.)

ROSCOE BLANTON, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 10, 1938.

BURREL BARASH, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

GOVERNMENT'S COMPENSATION ACT—compensation paid—claim for further amount may be taken of all payments made. Where compensation has been paid and employee makes claim for further amount, court has authority to take into account any and all payments of compensation that have been made to him, as he is only entitled to the specific sums of money which the terms of the Act designate, and if there has been an overpayment made for temporary total disability such overpayment may be credited to employer when called upon to pay specific loss or partial or total permanent disability.

SAME—when award may be made under. Where employee sustains accidental injuries arising out of and in the course of his employment, while engaged in extra hazardous employment, an award for such injuries may be made, in accordance with provisions of Act, upon compliance with terms thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant, Roscoe Blanton, was and still remains, according to the record, employed by the State as a highway maintenance patrolman. On November 18, 1935 while loading a gravel truck near Williamsfield, Illinois, in the performance of his duties, a cave-in occurred which covered claimant to the waist with gravel and dirt, resulting in a broken bone in the left leg about six inches above the knee. He was immediately attended by Dr. Wm. H. Maley of Galesburg, who pronounced the injury a compound fracture of the left femur about five inches above the knee. Due apparently to some splintered bone, the patient did not show proper recovery and Dr. Maley operated and continued in charge of the case until June 3, 1936 when the patient was transferred to Dr. H. B. Thomas, Orthopedic Surgeon, of 30 N. Michigan Ave., Chicago. Dr. Thomas operated on June 5, 1936 and reported that he removed a muscle lying between the two bones which prevented a union, and that new bone was put from the tibia around the fracture. Dr. Thomas retained the case until the patient was given a final medical discharge on March 1, 1937. At that time the patient was suffering from a stiffness of the knee, and Dr. Thomas estimated a permanent partial loss of use of the leg of twenty-five (25) per cent. On December 24, 1937 Dr. Thomas reported that under continued physiotherapy treatments patient's condition has improved and his range of knee motion had increased from fifty (50) per cent to sixty-six (66) per cent; that in his opinion it would continue to improve but that at the present time he has a disability of partial loss of use of the leg of twenty (20) per cent. Dr.

Thomas is Professor and head of Orthopedics at the College of Medicine, University of Illinois and Research and Educational Hospitals. Dr. Maley testified that there is excessive ankylosis of the knee and a bow of the thigh bone, and that three of the toes on the left foot are badly ankylosed and their motion limited, resulting in a limited flexion or motion of the left knee and foot of forty-five (45) degrees; that in his opinion the patient has a permanent partial loss of thirty-three and one-third ($33\frac{1}{3}$) per cent of the use of the left leg.

The State has expended large sums in giving to the claimant the best of care. It has paid Dr. Maley Four Hundred (\$400.00) Dollars; Dr. Thomas, Six Hundred Sixty-one (\$661.00) Dollars; St. Mary's Hospital, at Galesburg, Five Hundred Seventy-one and $50/100$ (\$571.50) Dollars; and St. Luke's Hospital, in Chicago, Three Hundred Fifty-four and $60/100$ (\$354.60) Dollars. The entire amount paid by the Highway Division for the above items, together with nurse hire, board, etc., is Two Thousand Two Hundred Seventy-six and $91/100$ (\$2,276.91) Dollars.

In addition thereto, there was paid to the claimant but was no evidence in the record from which a computation between the date of his injury on November 18, 1935 and his final medical discharge on March 1, 1937, the following items:

| | |
|--|------------|
| November, 1935 (19th to 30th inclusive)..... | \$ 48.00 |
| December, 1935 to May, 1936, inclusive, 6 months at \$120.00.. | 720.00 |
| June 1936 to February, 1937, inclusive, 9 months at \$60.00.. | 540.00 |
| | \$1,308.00 |

Claimant had been regularly employed as a highway maintenance patrolman from June 25, 1934, and during the year immediately prior to the accident had received salary at the rate of One Hundred (\$100.00) Dollars per month up to September 5, 1935 and from then on at One Hundred Twenty (\$120.00) Dollars per month, making a total yearly salary of One Thousand Two Hundred Ninety-one and $25/100$ (\$1,291.25) Dollars, or an average of Twenty-four and $83/100$ (\$24.83) Dollars per week. Under the provisions of *Paragraphs (a) and (b) of Section 8 of the Illinois Workmen's Compensation Act*, claimant was entitled to surgical care and also to compensation equal to fifty (50) per cent of his earnings but not in excess of Fifteen (\$15.00) Dollars per week.

The evidence shows that claimant is married and has one child, but that such child was not under sixteen years of age at the time of the accident. Claimant now seeks an award, under the provisions of *Paragraphs (c), 15-17, Section 8 of the Act*, for the partial loss of use of his left leg. Said Paragraph (c) provides, that, "The compensation which claimant can be paid for the period of temporary total incapacity shall not exceed sixty-four (64) weeks." The Attorney General contends that the sum of One Thousand Three Hundred Eight (\$1,308.00) Dollars previously paid to claimant is all for compensation; that claimant was entitled to temporary total disability for only a period of sixty-four (64) weeks from November 18th, 1935 to February 8th, 1937; further, that any over-payment is to be credited against such amount as claimant may be entitled to for specific partial loss of use of his left leg.

Claimant contends that the payment at the rate of One Hundred Twenty (\$120.00) Dollars per month made to him by the Highway Department from the date of his accident to May 31, 1936, in a total sum of Seven Hundred Sixty-eight (\$768.00) Dollars was made voluntarily as wages and must be regarded as having been made gratuitously or in the expectation of saving the life of the employee or reducing his disability and reducing the total compensation for which the employer would eventually be liable; that under the authority of *Crescent Coal Co. vs. Ind. Comm.*, 286 Ill., 102 and *Western Cartridge Co. vs. Ind. Comm.*, 327 Ill., 29, there is no authority for the court to deduct any part of said amount, as an over-payment of temporary compensation, from any amount found to be due for specific loss. The latter case is misconstrued by counsel. The statement therein made is, "An *allowance* for temporary total disability is not deductible from an allowance for partial permanent or total permanent disability." This does not mean that if an *over-payment* has been made for temporary total disability such *over-payment* cannot be entered as a credit to the employer when called upon to pay specific loss or partial or total permanent disability.

Claimant contends that the only point at issue in this case is the amount of specific loss to his leg, and that the court has no right "to delve into the amount of temporary compensation paid or to order a deduction of any over-pay-

ment made thereon, from any award now made to claimant for specific loss." Counsel for claimant state that, "they have found no provision in the Act which furnishes any authority whereby the court would have jurisdiction to make any such deduction." Claimant has received and now seeks further payments from his employer for injuries that were the result entirely of his own negligence. He is only entitled to receive such payment because of a special remedial statutory law granting to him specific rights. Claimant is entitled only to the specific sums of money which the terms of such Act designate. We therefore hold that in considering the amount of money which any employer is called upon to pay for injuries and loss of time growing out of an accident, the court has authority to take into account any and all payments of compensation that have been made to claimant, in determining what further amount may be due him.

Whether or not the payments made to claimant for the period from November 18, 1935 to May 13, 1936 should be treated as payment of *wages* or of *compensation* is not easily determined from the record. During all of such period claimant was incapacitated from work and was receiving surgical treatment from Dr. Maley, but received payments from month to month in the full amount of his regular wages. After June 1, 1936, to March 1, 1937 he received payments of Sixty (\$60.00) Dollars per month. Claimant cites the case of *Lewis vs. Ind. Comm.*, 357 Ill. 309 in support of his contention, that the payments should be treated as wages. No notice of claim for compensation was made within six months after the date of the employee's injury, but a claim was filed by his widow within six months after the date of the last of the three payments. Counsel for claimant there contended, that the demand for wages constituted notice of claim for compensation within the meaning of *Section 24* of the *Act*. The court held, that the request for *his wages* conveyed no intimation that he asserted any legal right to compensation; that there was no evidence showing that the employer had any notice of any accident until more than six months thereafter; that the requests were for his wages and not for compensation; that the employer in that case, according to an established custom, paid the wages which the employee would have received had he been engaged in the performance of his duties, and that such payments were apparently made voluntarily and with-

out reference to any provision of the Workmen's Compensation Act; that the employee's wife receipted for such payments as wages. The court further held, that the question whether a claim for compensation has been made as required is a question of fact to be determined like any other similar question. The present case is to be distinguished from the Lewis case. Here, the employer at once knew of the accidental injury and immediately began furnishing surgical care. The funds paid to claimant were all for unproductive time, while he was disabled from the accident in question. The payment of full wages during a period of disability, although under a Company policy of paying full wages while employees are away from work on account of sickness or injury, will be treated as a payment of compensation when the employer knew that the employee was disabled on account of an accidental injury and when such employer at the time of such payments does not deny liability. In other words, where the employer knows that the disability or inability to work is due to the accidental injury and he makes payments, even under a policy of paying full wages during inability to work, with no denial of liability for compensation, such payments will be regarded as payment of compensation. This rule is fully set forth in the case of *United Air Lines, Inc. vs. Ind. Comm.*, 364 Ill. 346. In that case the court said:

"The defendant in error concedes that he made no claim for compensation against the employer within the six-months' period and that he did not make an application for compensation with the Industrial Commission within the one-year period, but he insists that he did make an application for compensation with the Industrial Commission within one year after the last payment of compensation. His contention in this regard is the vital question in the case. The facts are very similar to those in *Field & Co. vs. Industrial Com.*, 205 Ill. 134, in which the rule was laid down that where an employer makes payments to an injured employee during a period of time when the employee is unable to work, and liability under the Compensation Act is not denied, such payments will be construed to have been made in consequence of the employer's liability. This rule is based upon the doctrine that when the employer has knowledge of the injury and does not deny liability, the employee has a right to regard the payments as having been made under the Act and is not bound to make demand for further compensation as long as the payments are continued. It is the duty of an employer to provide an employee who has suffered an accidental injury arising out of and in the course of his employment, necessary first aid and medical, surgical and hospital services, and, in case of temporary total incapacity for work, to pay compensation as long as such incapacity lasts, subject to the limitations provided by sub-section (b) of Section 8 of said Act.

The mere fact that the company has adopted a policy of paying its employees when they are unable to work, and does so, is not sufficient to bar the right of the employee to claim compensation when the employer ceases to make further payments. Any other doctrine would be in contravention of the purpose and the spirit of the Compensation Act."

The total amount paid claimant herein during the period of his disability will therefore be regarded as compensation and will be taken into account in computing the right to an additional award and for any further payment, to which he may now be entitled.

Claimant is entitled to an award for specific disability. The evidence shows that his left leg is one inch shorter than the right, and that there is a stiffness of the knee and ankle joints and of three toes, and forty-five (45) degrees limited motion in the left ankle and in the bending of the left knee.

From an examination of the entire record including the testimony of Dr. Maley and Dr. Thomas, we find that claimant is entitled to an award of twenty-six (26) per cent specific loss of use of the left leg; such loss resulting from the accidental injury suffered by claimant while an employee of the State of Illinois on the 18th day of November, 1935. Claimant's average weekly wage for the year preceding said accident was Twenty-four and 83/100 (\$24.83) Dollars. Under the provisions of *Section 8 (c) 15-17* of the *Act* he is entitled to payment for specific loss of fifty (50) per cent of said sum for the period of 49.40 weeks, or Six Hundred Thirteen and 05/100 (\$613.05) Dollars for 26% loss of use of his left leg. He was entitled to compensation for temporary total disability at the rate of Twelve and 41/100 (\$12.41) Dollars per week for sixty-four (64) weeks, or Seven Hundred Ninety-four and 24/100 (\$794.24) Dollars. This added to the amount due for specific disability totals One Thousand Four Hundred Seven and 29/100 (\$1,407.29) Dollars. He has heretofore received One Thousand Three Hundred Eight (\$1,308.00) Dollars, leaving a balance due on the present award in the sum of Ninety-nine and 29/100 (\$99.29) Dollars.

It is therefore ordered that an award be and the same is hereby made in favor of Roscoe Blanton, claimant herein, for the sum of Ninety-nine and 29/100 (\$99.29) Dollars. As the total amount of such award has heretofore accrued, same is payable in full at this time.

This award being subject to the provisions of an Act entitled, "An Act Making an Appropriation to Pay Com-

pensation Claims of State Employees and Providing for the Method of Payment Thereof." Approved July 3, 1937 (Sess. Laws 1937 p. 83), and being, by the terms of such act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from said appropriation from the Road Fund in the manner provided for in such Act.

(No. 3075—Claim denied.)

STEVE NEMETH, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 10, 1938.

GEORGE N. BLATT, JR., for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

HIGHWAYS—culverts and ditches part of—maintenance of, governmental function. The State exercises a governmental function in the construction and maintenance of its highways, and culverts and ditches used in connection therewith are a part of said highways.

NEGLIGENCE—improper construction of culvert—failure to clean and keep ditches in good repair—State not liable for. The doctrine of respondeat superior is not applicable to the State, in the exercise of its governmental functions and it is not liable for damages occasioned by the negligent acts, or omissions of its officers, agents or servants, in constructing culverts, or failure to clean and keep ditches in good repair.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein is now and was at the time of the matters complained of, the owner of certain farm land in Will County, Illinois, as described in his complaint. According to the latter, the State of Illinois, in the month of September, 1930, constructed a two-lane concrete highway known as S. B. 1. Route No. 7 in front of claimant's property. In his complaint he alleges that prior to such construction his property naturally drained across and under the then existing dirt and gravel roadway; that in order to provide for the drainage of claimant's property after the improvement, the State improperly constructed a culvert under the new highway and connected same with claimant's drainage tile; that the culvert was improperly constructed so that the lower or bottom level of same was several feet higher than that of the original culvert and of the natural drainage level; the result of such

alleged improper construction being to prevent the surface water flowing under the highway, and causing it to back up into the claimant's tiling system, thereby flooding his property. Claimant also alleges that in the construction of such highway, the respondent graded and filled in the right-of way to the east and west of his property so that the natural watershed that previously ran to the east of the entrance to his home was changed from a northerly direction, and now for approximately one and one-half miles flows down upon claimant's property. Notwithstanding the foregoing charges of negligent construction, the complaint further alleges that prior to the year 1934 the ditches along such highway were in good repair and took care of the surface water, but that due to the neglect of the respondent these ditches were not maintained in good repair, were not cleaned at regular intervals, and that the surface water which drains through and over such ditch carried silt, dirt, rocks and debris to the culvert under such highway, causing the latter to be filled up to within six inches of the top and preventing the natural flow of water under such highway, thereby obstructing the flow of water from claimant's property and causing his tiling system to become obstructed. That by reason of the foregoing, fifteen (15) acres of his property was flooded during the years 1934-1935-1936, and that an additional ten (10) acres became untillable, and that fifteen hundred (1500) feet of twelve (12) inch tile, and one thousand (1000) feet of seven (7) inch tile, and eight hundred (800) feet of five (5) inch tile was cracked by freezing. Claimant asks damages for the cost of such tile, the labor necessary to replace same, and Five Hundred (\$500.00) Dollars per year for the loss of production of crops on such acreage, all to a total damage of Two Thousand One Hundred Ninety One (\$2,191.00) Dollars, for which he seeks an award.

The complaint was filed April 1, 1937, and the damages sought therein as appears from the foregoing are based, first—on improper construction work in the original building of the highway in 1930, and secondly—because of the alleged negligent maintenance by the State of the drainage along said highway in the years 1934-35-36. This improvement was originally known as S. B. I. Route No. 53, Construction Section 136, now known as S. B. I. Route No. 7. It appears from the testimony herein that claimant was very active in

obtaining the construction of this highway and freely gave a strip of two (2) feet of ground along the frontage of his property for the purpose of aiding in the building thereof, receiving nominal compensation of Twenty (\$20.00) Dollars, only because respondent insisted on paying some consideration for the land. It appears that such construction was completed between 1931 and 1932, and from the testimony it would appear that more than five years elapsed from the time of the construction of the highway and the filing of the complaint on April 1, 1937. As to that portion of the complaint which is based upon improper or negligent construction of the culvert under the highway, the court must find that claimant's rights are barred by the Statutes of Limitations. If such were not the case however, the record would not support an award upon that portion of plaintiff's claim. In fact he negatives the merit thereof in his complaint itself, for in paragraph 5 of his complaint he states that from 1930 to 1934 the surface water was properly cared for by the drainage ditches, but that in the latter year, *due to the neglect of respondent to keep these ditches in good repair and to clean same*, etc. debris was carried into the culvert and the latter became filled up, thereby obstructing the natural flow of water from claimant's property and obstructing the tiling system existing on said land. The law is that, in arriving at the damage to property, such damage is determined by the difference between the fair cash market value of the property just prior to the time the making of the improvement commenced, and its fair cash market value just after the improvement is completed. (*Ross vs. City of Chicago*, 91 App. 416.) No evidence was introduced by which such difference in value, if any, could be determined in the present case. The evidence does disclose however (Claimant's Testimony Transcript p. 22) that prior to the building of the hard road the highway became muddy and bad and that "we needed the highway"; that before the concrete highway was constructed the water in flood time flowed across claimant's fields from his neighbor's field on the north, then through a water course around the back of his building across his fields and then south through a large culvert into the ditch along the highway, thus describing about a half circle around claimant's land; that since the construction of the concrete highway the water comes

straight east down through the culvert and into the south ditch, so that claimant's land which lies north of his buildings has been benefited by not having the water run over it (Tr. p. 29). It further appears that the road ditch on the north side of the pavement is larger than the old ditch which had become grown up in grass and weeds. Claimant further testified (Tr. p. 30) that shortly after the highway was constructed the fresh silt and clay that neither he nor the State Highway Department expected, washed into the ditch on the south side of the road such an amount that it clogged up the ditch, thereby holding back the water in the tiles, and clogging the culvert to within a foot of the top, and thus clogging the outlets to his tile. This culvert is at approximately the same location as the culvert that existed previous to the construction of the hard road. Claimant has not only failed to establish damages resulting from the construction of the pavement in question, but has established that certain benefits to the value of his land should have resulted therefrom.

The Attorney General contends that no damages, based upon any alleged negligence upon the part of the Highway Department in the maintenance of said highway, can be legally allowed to claimant. The testimony of claimant as to the neglect upon the part of the Highway Department to keep the silt and debris cleaned out of the culvert and ditch in question, stands uncontradicted by any other competent evidence. Claimant testified that if the silt was kept out of this large culvert and into the south ditch all of his troubles could be avoided; that at different times he applied to the Highway Department by letter and in person at the Elgin Office, requesting that they terrace the ditches, but that this was not done until three years after the highway was built, and that during this period the silt and dirt continued to wash out of the ditch and down into the water course; that the Highway Department cleaned out the culvert in 1934 and again in 1936 and that the road ditch to the west of the culvert has now been terraced. Claimant further testified that with the fill removed and the ditch and culvert cleaned out, he is able to get proper tile drainage, and that same is now working fine. (Tr. p. 47.) The testimony of claimant further shows the breaking of tile as complained of, but it shows that these tile became frozen and cracked during a recent winter when the temperature was 20° below zero, and that

such a freezing temperature had not been previously experienced since the time the tile were originally laid. Taken in all, the evidence is not conclusive that the damages suffered by claimant are due entirely to any negligence upon the part of the State Highway Department, but if such were true, the objection raised by the Attorney General to any award upon that ground would have to be sustained for the reason, as stated in the case of *Wentworth vs. State*, 9 C. C. R. 240.

"The State exercises a governmental function in the construction and maintenance of a public highway, and does not become liable for the negligence of its agents or employees in the maintenance thereof, in the absence of a statute specifically creating such liability."

The legislature of Illinois has not seen fit to pass any legislation creating a liability upon the part of the State covering the complaint as here presented, and the court is of the opinion that no award can be properly allowed.

An award is denied and the claim dismissed.

(No. 3187—Claimant awarded \$23.40.)

THE BORDEN COMPANY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 10, 1938.

GEORGE F. BARRY, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

SUPPLIES—when award may be made for. The facts in this case are similar to those in *Horst & Strieter Company vs. State*, No. 3191, *infra*, and what was said in that case is applicable herein.

MR. JUSTICE YANTIS delivered the opinion of the court:

During May and June, 1936, claimant, The Borden Company, sold and delivered eighteen (18) gallons of "ice cream sherbet" to the Illinois Industrial Home for the Blind, one of the charitable institutions maintained and operated by the State of Illinois. The records at the institution show that the merchandise was received and used, and it further appears that there were unexpended funds remaining in the appropriation for said institution, out of which the bill for same could have been paid. It further appears that such appropriation lapsed however before said claim was presented

for payment; that \$23.40 is the usual and customary charge for such merchandise, and that the bill has never been paid. As heretofore held in the case of *Rock Island Sand & Gravel Co. vs. State*, 8 C. C. R. 165 and other cases,

"Where claimant has rendered services or furnished supplies to the State on the order or request of an official authorized to contract for the same, and submits a bill therefor within a reasonable time, and due to no negligence or fault on the part of claimant same is not approved and vouchered for payment before the appropriation from which it is payable lapses, an award for the reasonable and customary value of the services or supplies will be made where, at the time the obligation was incurred, there were sufficient funds remaining unexpended in the appropriation to pay for the same."

No sufficient showing of negligence or fault upon the part of claimant to justify non-payment of the bill appears, and pursuant to the rulings heretofore made, an award is hereby allowed in favor of claimant in the sum of \$23.40.

(No. 2931—Claimant awarded \$1,829.93.)

WILLIAM E. BAUER, Claimant, vs. STATE OF ILLINOIS, Respondent.
Opinion filed May 11, 1938.

Claimant, pro se.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award for compensation for loss of use of leg. may be made under.* Where it appears that employee of State sustains accidental injuries, resulting in loss of use of leg, arising out of and in the course of his employment, while engaged in extra hazardous employment, an award for compensation for same may be made, in accordance with the provisions of the Act, upon compliance with the terms thereof.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On August 27th, 1921, claimant entered the employ of the respondent as an attendant at the Elgin State Hospital, Elgin, Illinois, and continued in such employment until December 17th, 1935. On the last mentioned date, while claimant was on night duty at one of the farm cottages known as Farm Colony No. 3, he was struck and tripped by one of the patients, whereby he fell to the floor and fractured his left hip. He was taken to the Hospital Unit of such institution and re-

remained there continuously until August 19th, 1936. While at such hospital he was under the care of Dr. George A. Wiltrakis, Senior Physician and member of the staff at the Elgin State Hospital. Dr. Wiltrakis has seen the claimant at infrequent intervals since he left the hospital, and supervised the taking of a number of X-ray pictures, the last of which was taken February 28th, 1938. Such pictures show a fracture of the neck of the femur; also that the broken fragments have failed to unite, and also that there is some absorption of the neck of the femur.

There is no dispute in the testimony as to the nature or extent of claimant's injury. From the medical testimony in the record it appears that claimant's condition is permanent; that it reached a permanent stage about three months after the injury; that claimant will never be able to use his left leg; that he is able to move about now with the use of a cane and crutch; that in walking his left foot turns outward from the normal position; that his left leg is approximately two inches shorter than his right. Since the time he left the hospital claimant has continued to reside in one of the cottages at the institution.

It appears from the evidence that the Elgin State Hospital is located on a tract of land consisting of approximately 800 acres; that there are about fifty buildings, the main building being four stories in height; that at the time of the accident there were approximately 4,700 patients and 650 employees at the institution; that the institution has a central heating plant, a power plant for the generation of electricity, a water plant, machine shop, carpenter shop, electric shop, tin shop, laundry, etc.

The institution is primarily a hospital, but maintains a farm in connection therewith which serves the two-fold purpose of providing an industrial occupation for some of the patients, and also provides farm products for the patients and employees. The farm colony is an integral part of the institution; it consists of three patients' cottages, employees' cottage, barns and other farm buildings, and is located about three and one-half miles from the main buildings.

Upon a consideration of the record we find:

1. That on December 17th, 1935 claimant and respondent were operating under the provisions of the Workmen's Compensation Act of this State.

2. That on said date claimant sustained accidental injuries which arose out of and in the course of his employment.

3. That notice of the accident was given to said respondent and claim for compensation on account thereof was made within the time required by the provisions of such Act.

4. That claimant's annual earnings were \$969.00, and his average weekly wages were \$18.63.

5. That claimant at the time of the injury was 70 years of age and unmarried.

6. That all necessary first aid, medical, surgical and hospital services have been provided by respondent.

7. That claimant was temporarily totally disabled from December 18th, 1935 to March 18th, 1936.

8. That as the result of such accident claimant has sustained the permanent and complete loss of the use of his left leg.

9. That the sum of \$60.00 has been paid to apply on the compensation due him.

10. That claimant is entitled to have and recover from the respondent the following sums, to-wit:

a) The sum of \$9.31 per week for 13 weeks, to-wit, \$121.03, for temporary total incapacity as aforesaid;

b) The sum of \$9.31 per week for 190 weeks, to-wit, \$1,768.90, for the permanent and complete loss of the use of his left leg; pursuant to the provisions of paragraph E-15, Section 8 of the Compensation Act.

The amount which claimant is entitled to receive as above, is \$1,889.93, less the sum of \$60.00 heretofore paid to him, to-wit, \$1,829.93.

Award is therefore entered in favor of the claimant for the sum of \$1,829.93, payable in 196 weekly installments of \$9.31 each, commencing on January 29th, 1936, and one final installment of \$5.17.

Compensation has accrued from January 29th, 1936 to May 11th, 1938, to-wit, the sum of \$1,107.89. The aforementioned award of \$1,829.93 is therefore payable as follows: the sum of \$1,107.89 is payable forthwith, and the balance of \$722.04 is payable in 77 weekly payments of \$9.31 each, commencing May 18th, 1938, and one final payment of \$5.17.

This award being subject to the provisions of an Act entitled "An Act Making an Appropriation to Pay Com

pensation Claims of State Employees and Providing for the Method of Payment Thereof," approved July 3d, 1937 (Session Laws 1937, p. 83) and being by the terms of such Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the General Revenue Fund in the manner provided for in such Act.

(No. 3090—Claim denied.)

BENTON DENHAM, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 11, 1938.

WIRT HERRICK, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—making claim and filing application for compensation within time provided in, jurisdictional. Where record shows that no claim was made, nor application filed for compensation, within time fixed in Section 24 of the Act, the court is without jurisdiction to proceed with hearing and motion to dismiss must be allowed.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Prior to and on October 29th, 1934 the claimant was in the employ of respondent as a patrolman's helper in the Department of Public Works and Buildings, Division of Highways. On the last mentioned date, while engaged in driving a truck in the course of his employment, at a point about three and one-half miles east of Tuscola, the steering mechanism became defective, the truck skidded and overturned, and claimant was severely injured. No formal notice of the injury was given to the respondent, but claimant's superior officer had knowledge of the injury within twenty-four hours thereafter.

Claimant is a married man and had one child under the age of sixteen years at the time of the accident. His annual earnings computed in accordance with the provisions of Paragraph E of Section 10 of the Workmen's Compensation Act, were Six Hundred Forty Dollars (\$640.00). Respondent paid the claimant the sum of Thirty-three Dollars (\$33.00) per week for eight (8) weeks after the date of the injury, and

also paid medical, surgical and hospital bills in the total amount of Four Hundred Sixty-two Dollars and Thirty Cents (\$462.30).

The Attorney General has moved to dismiss the case for the reason that application for compensation was not filed within one year after the date of the injury, or within one year after the date of the last payment of compensation, as required by Section 24 of the Workmen's Compensation Act of this State.

Claimant has consented to a consideration of the claim upon the facts set out in the report made by M. K. Lingle, Engineer of Claims of the Division of Highways.

Such report shows that claimant was injured on October 29th, 1934; that he was paid compensation for approximately two months after the accident; that the last medical treatment he received was on March 1st, 1935; that application for compensation was filed herein on April 28th, 1937, to-wit, more than two years after the last payment of compensation.

Section 24 of the Workmen's Compensation Act provides that "unless application for compensation is filed with the Industrial Commission within one year after the date of the injury, or within one year after the date of the last payment of compensation, the right to file such application shall be barred."

The Supreme Court of this State has repeatedly held that compliance with the foregoing provision is jurisdictional. *Haiselden vs. Ind. Com.*, 275 Ill. 114; *Bushnell vs. Ind. Com.*, 276 Ill. 262; *Inland Rubber Co. vs. Ind. Com.*, 309 Ill. 43; *Duquoin School District vs. Ind. Com.*, 329 Ill. 543; *City of Rochelle vs. Ind. Com.*, 332 Ill. 386.

Claimant in his complaint also asks for an award in the amount of One Hundred Ninety-five Dollars and Fifty Cents (\$195.50) for medical services incurred by him, for which services payment has not yet been made. Under the facts set forth in the aforementioned report of Mr. M. K. Lingle, we are not justified in allowing an award for such medical services. However, if any medical or surgical services were rendered to the claimant under circumstances which would entitle the person rendering such services to an award therefor under the provisions of the Workmen's Compensation

Act, the persons rendering such services may file their individual claims in this court therefor.

Under the law as above set forth, the motion of the Attorney General to dismiss must be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 3221—Claimant awarded \$81.13.)

PHILLIPS PETROLEUM COMPANY, A CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 11, 1938.

H. P. ROBINSON, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

SUPPLIES—*lapse of appropriation—when award may be made for.* The facts in this case are the same as those in *Rock Island Sand & Gravel Co. vs. State*, 8 Court of Claims Reports, page 165 and *Rorst & Stricter Company vs. State*, No. 3191, *infra*, and what was said in those cases is applicable herein.

MR. JUSTICE YANTIS delivered the opinion of the court:

A stipulation, signed by claimant and respondent, has been filed herein. From the recitals thereof it appears that during the months of April and June, 1937 an order was placed by the Division of Highways under No. 87855 for the delivery to the Highway Division of certain gasoline and motor oil as set out in Claimant's Exhibits "A" and "B," and that such supplies were furnished during the period mentioned to a total value of \$81.13.

A report by M. K. Lingle, Engineer of Claims, from the Division of Highways, states that the supplies in question were duly delivered, received and used by respondent at the times and places stated, and that the prices charged are in accord with those contained in the contract between the parties; that the bills were not presented for payment until after September 30, 1937 and were not eligible for payment out of the 59th Biennium Appropriation, for the reason that such appropriation had lapsed. It further appears that at the time the purchase order was issued and at the time the supplies in question were delivered, there remained unexpended in the appropriation from which the same was properly payable, a balance sufficient to pay for same.

As heretofore held in the case of *Rock Island Sand & Gravel Co. vs. State*, 8 C. C. R. 165, and other cases,

"Where claimant has rendered services or furnished supplies to the State on the order or request of an official authorized to contract for the same, and submits a bill therefor within a reasonable time, and due to no negligence or fault on the part of claimant same is not approved and vouchered for payment before the appropriation from which it is payable lapses, an award for the reasonable and customary value of the services or supplies will be made where, at the time the obligation was incurred, there were sufficient funds remaining unexpended in the appropriation to pay for the same."

No sufficient showing of negligence or fault upon the part of claimant to justify non-payment of the bill appears, and pursuant to the rulings heretofore made, an award is hereby allowed in favor of claimant in the sum of \$81.13. The application of claimant for interest on the amount of said bill is denied as there is no statute in the State which permits the payment of costs and interest. (See *Southern Kraft Corp. vs. State*, 9 C. C. R. 306.)

(No. 3218—Claimant awarded \$53.93.)

SWIFT & COMPANY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 11, 1938.

Claimant, pro se.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

SUPPLIES—*lapse of appropriation, out of which bill could be paid before payment thereof—when award may be made for.* The facts in this claim are the same as those in *Rock Island Sand & Gravel Co. vs. State*, 8 Court of Claims Reports, page 165 and *Horst & Strieter Company*, No. 3191, *infra*, and the opinions in those cases are controlling herein.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

The facts herein have been stipulated, and from such stipulation it appears that pursuant to the order and request of the respondent, claimant herein on June 1st, 1937 delivered to the respondent for the use of the Alton State Hospital, a State charitable institution located at Alton, Illinois, 240 dozen eggs; that the reasonable value of such merchan-

dise at such time and place was \$53.93; that claimant thereafter submitted a bill therefor, but through no fault or neglect on the part of the claimant, the bill was not vouchered for payment prior to the lapse of the appropriation from which the same was payable; that at the time such merchandise was purchased, there remained in such appropriation an unexpended balance sufficient to pay for such merchandise in full.

We have repeatedly held that where supplies have been furnished to the State on the order or request of an official authorized to purchase the same, and a bill therefor has been submitted within a reasonable time but the same has not been approved and vouchered for payment before the lapse of the appropriation from which it is payable, without any fault or neglect on the part of the claimant, an award for the reasonable value of such supplies will be made, where at the time of the purchase thereof, there were sufficient funds, remaining unexpended in the proper appropriation to pay for the same. *Rock Island Sand and Gravel Co. vs. State*, 8 C. C. R. 165; *Indian Motorcycle Co. vs. State*, 9 C. C. R. 526; *Wabash Telephone Co. vs. State*, No. 3105, decided at the January Term, 1938.

Award is therefore entered in favor of the claimant for the sum of Fifty-three Dollars and Ninety-three Cents (\$53.93).

(No. 3209—Claimant awarded \$9.14.)

PURE OIL COMPANY, Claimant, vs. STATE OF ILLINOIS. Respondent.

Opinion filed May 11, 1938.

Claimant, pro se.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

SUPPLIER—*lapse of appropriation out of which bill could be paid—before payment thereof—when award for may be made.* The facts in this claim are the same as those in *Rock Island Sand & Gravel Co. vs. State*, 8 Court of Claims Reports, page 165 and *Horst & Strieter Company*, No. 3191, *infra*, and the opinions in said cases are controlling herein.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

From the stipulation of facts herein it appears that between June 6th and June 20th, 1937, the claimant, pursuant

to proper authorization, order and request furnished and delivered to the respondent at Naperville, for use in connection with the operation and maintenance of certain motor vehicles used by the Division of Highways, Department of Public Works and Buildings of the respondent, thirty-six gallons of gas and eleven pounds of grease; that the usual and customary charge therefor at that time and place was \$9.14; that no bill therefor was presented prior to September 30th, 1937, the date on which the appropriation lapsed out of which payment should have been made; that at the time such merchandise was purchased, there was an unexpended balance in the appropriation out of which payment should have been made, sufficient to pay such claim in full.

We have repeatedly held that where supplies have been furnished to the State on the order or request of an official authorized to purchase the same, and a bill therefor has been submitted within a reasonable time, but the same has not been approved and vouchered for payment before the lapse of the appropriation from which it is payable, without any fault or neglect on the part of the claimant, an award for the reasonable value of such supplies will be made, where at the time of the purchase thereof, there were sufficient funds remaining unexpended in the proper appropriation to pay for the same. *Rock Island Sand and Gravel Co. vs. State*, 8 C. C. R. 165; *Indian Motorcycle Co. vs. State*, 9 C. C. R. 526; *Wabash Telephone Co. vs. State*, No. 3105, decided at the January Term, 1938.

Claimant presented its claim within a reasonable time, and under the facts and the law as above set forth, is entitled to an award.

Award therefore is entered in favor of the claimant for the sum of Nine Dollars and Fourteen Cents (\$9.14).

(No. 3183—Claimant awarded \$28.60.)

COLEMAN OIL COMPANY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 11, 1938.

Claimant, pro se.

OTTO KERNER, Attorney General; MURRAY F. MURNE, Assistant Attorney General, for respondent.

SUPPLIES when award may be made for. The facts in this case are almost identical with those in *Horst & Stricker vs. State*, No. 3191, *infra*, and the opinion in that case is decisive herein.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

From the stipulation of facts herein it appears that on April 14th, 1937 claimant delivered to the respondent at Peoria State Hospital, for use at such institution, pursuant to the order of the Chief Clerk thereof, sixty-five gallons of motor oil; that the usual and customary charge for such merchandise at the time and place of the delivery thereof was \$28.60; that claimant thereafter submitted its bill to the Chief Clerk of such institution, and through no fault on the part of the claimant, such bill was not vouchered for payment prior to the lapse of the appropriation out of which the same should have been paid, to-wit, on September 30th, 1937; that at the time such merchandise was ordered, there remained in the proper appropriation an unexpended balance sufficient to pay such bill in full.

We have held in numerous cases that where supplies have been furnished to the State on the order or request of an official authorized to purchase the same, and a bill therefor has been submitted within a reasonable time, but the same has not been approved and vouchered for payment before the lapse of the appropriation from which it is payable, without any fault or neglect on the part of the claimant, an award for the reasonable value of such supplies will be made, where at the time of the purchase thereof, there were sufficient funds remaining unexpended in the proper appropriation to pay for the same. *Rock Island Sand and Gravel Co. vs. State*, 8 C. C. R. 165; *Indian Motorcycle Co. vs. State*, 9 C. C. R. 526; *Wabash Telephone Co. vs. State*, No. 3105, decided at the January Term, 1938.

Under the facts and the law as above set forth, claimant is entitled to an award.

Award is therefore entered in favor of the claimant for the sum of Twenty-eight Dollars and Sixty Cents (\$28.60).

(Nos. 3215-3216, Consolidated—Claims denied.)

JAMES H. WOLFE, No. 3215 AND METROPOLITAN TRUST COMPANY, No. 3216, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 29, 1938.

LLOYD T. BAILEY, for claimants.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

HIGHWAYS—maintenance of governmental function. In the construction and maintenance of public highways, the State exercises a governmental function.

NEGLIGENCE—respondent superior—doctrine of, not applicable to State. In the exercise of a governmental function, the State is not liable for the negligence of its officers, agents or servants, the doctrine of respondent superior not being applicable to it.

WRONGFUL DEATH—Injuries Act—proviso that action be commenced within one year after—not merely Statute of Limitations. The one year period fixed by the Injuries Act, for commencing an action for wrongful death is not to be considered merely as a Statute of Limitations, but is a condition of liability and if suit is not commenced within the time fixed therein, there can be no recovery.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Both of above claims grow out of the same accident; both claimants are represented by the same counsel; and the claims are therefore consolidated for the purpose of this hearing.

The respective complaints allege in substance that about 3:30 A. M. on the 27th day of September, A. D. 1936, the claimant, James H. Wolfe, was driving his automobile in a northerly direction on Cicero Avenue in the City of Chicago; that his wife, Marie Wolfe, was riding as a passenger in said automobile; that said James H. Wolfe and said Marie Wolfe were each in the exercise of all due care and caution for his and her own safety; that said Cicero Avenue was then a State highway known as Route No. 50; that between 39th and 42nd Streets in said City of Chicago, said Cicero Avenue intersects a certain viaduct and passes under the tracks of the Chicago and Alton Railroad Company; that it was dark and raining; that said automobile so being driven by the claimant, James H. Wolfe, as aforesaid, then and there ran into and struck a pillar supporting said viaduct; that as a direct and

proximate result thereof said Marie Wolfe sustained injuries from which she died on the same day; said James H. Wolfe was seriously and permanently injured, and said automobile was damaged to the extent of \$150.00; that said Marie Wolfe left her surviving her husband, James H. Wolfe, and her infant daughter, Marie Ann Wolfe; that the Metropolitan Trust Company was duly appointed Administrator of the Estate of said Marie Wolfe; that the accident in question resulted from the carelessness and negligence of the respondent in the construction and maintenance of said highway and in failing to provide lights, signs, or other warnings on said viaduct and the pillars supporting the same.

Both complaints also allege that on March 9th, 1937 the claimants filed their respective complaints in the Circuit Court of Cook County, against the City of Chicago and The Alton Railroad Company; that on January 27th, 1938 the Presiding Judge dismissed both cases for the reason that said highway at the point in question was a State highway; and that the respondent herein was therefore charged with the duty to care for and maintain the same.

The Attorney General has entered a motion to dismiss in each case, for the reason that the respondent is not liable for the negligent and wrongful acts of its employees in the construction and maintenance of its highways.

We have repeatedly held that in the construction and maintenance of its system of State highways, the State is acting in a governmental capacity. *Spurrell vs. State*, No. 2228, decided September Term, 1937; *Tivnan vs. State*, 9 C. C. R. 495; *McGready vs. State*, 9 C. C. R. 63; *Baumgart vs. State*, 8 C. C. R. 220; *Bucholz vs. State*, 7 C. C. R. 241; *Braun vs. State*, 6 C. C. R. 104.

It has been uniformly held in this State that in the exercise of its governmental functions, the State is not liable for the negligence of its agents or employees, in the absence of a statute making it so liable. *Minear vs. State Board of Agriculture*, 259 Ill. 549; *Gebhardt vs. Village of LaGrange Park*, 354 Ill. 234; *City of Chicago vs. Williams*, 182 Ill. 135; *Royal vs. State*, 9 C. C. R. 67; *Ryan vs. State*, 8 C. C. R. 361; *Wilson vs. State*, 8 C. C. R. 72; 25 R. C. L. p. 407, see. 43.

Furthermore, as to the case of Metropolitan Trust Co., No. 3216, the complaint was filed in this court on March 1st,

1938, to wit, more than one year after the date of the death of said Marie Wolfe.

Our Supreme Court has held in numerous cases that the one year period fixed by the Injuries Act for commencing an action for wrongful death is not to be considered merely as a statute of limitations but is a condition of liability, and that if suit is not commenced within the time fixed by the statute, plaintiff cannot recover. *Hartray vs. Chicago Railways Co.*, 290 Ill. 85; *Goldstein vs. Chicago City Railway Co.*, 286 Ill. 297; *Carlin vs. Peerless Gas Light Co.*, 283 Ill. 142.

For the reasons above set forth, the motion to dismiss in each case must be allowed.

IT IS THEREFORE ORDERED that the motion to dismiss, in each case, be allowed, and the case dismissed.

(No. 2677—Claimant awarded \$2,234.72.)

PETER BAUER, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 25, 1938.

Opinion on review filed June 20, 1938.

KURT KIESOW, for claimant.

OTTO KERNER, Attorney General; GLENN TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when evidence insufficient to justify award for compensation for permanent partial disability.* Where evidence shows amount of earnings of employee prior to accident, but fails to show what he has earned or is able to earn in some suitable employment thereafter, there is nothing before the court upon which to base an award on a claim for permanent partial disability.

SAME—*when award may be made for permanent partial disability.* Where an employee of State sustains accidental injuries arising out of and in the course of his employment, while engaged in extra-hazardous employment, resulting in partially incapacitating him from pursuing his usual and customary line of employment, an award may be made for sum equal to fifty per centum of the difference between the average amount earned by such employee before the injuries, and the average amount he is able to earn in some suitable employment thereafter.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

For more than a year prior to April 25th, 1934, claimant was in the employ of respondent as a highway maintenance patrolman on S. B. 1. Route 20, Section 107, and on the last

mentioned date was working on said route southwest of Waukegan, in Lake County.

On said date claimant and a fellow-employee were heating a barrel of "cut-back," a mixture consisting largely of tar and pitch, which was used in the repairing of roads. In the process of heating, the barrel exploded and claimant was struck by portions thereof, and was burned about the spine, face, neck and arms by some of the mixture which was thrown upon him as the result of the explosion. He was rendered unconscious and remained in that condition for five days. Immediately after the accident he was taken to St. Theresa's Hospital at Waukegan, and remained there until May 8th, 1934, when he returned to his home. While at the hospital he was under the care of Dr. L. E. Bovik, who continued to treat him after he returned to his home. Claimant remained at home until about July 1st when he was asked to and did substitute for a supervisor of maintenance while the latter was away on his vacation. He continued to work as a substitute supervisor for about five weeks, and then assisted in breaking in a new supervisor, working in that capacity until September 8th, 1934. Apparently the only work he had to do as Supervisor was to ride around in an automobile and oversee the work being done, and afterwards to ride with the new supervisor until he became familiar with the new territory.

Claimant testified that his condition was such that he was unable to continue with such work after September 8th, and about that date he was notified to return to Dr. Bovik for further treatment. On September 10th, 1934 he again returned to the hospital where he remained for thirteen days. X-ray pictures were taken on July 31st, 1934, September 18th, 1934, and May 29th, 1936.

Claimant was sixty-seven years of age at the time of the accident, was married, and had no children under the age of sixteen years.

Claimant's salary was One Hundred Dollars (\$100.00) per month, and he continued to receive his full salary from the date of the injury to November 1st, 1934. Thereafter, from November 1st, 1934 to May 1st, 1935 he was paid half of his regular salary, to-wit, Fifty Dollars (\$50.00) per month.

After his return from the hospital on September 23d, 1934, he continued to go to the office of Dr. Bovik three times

a week for light and rubbing treatments until February 10th or 12th, 1935.

Prior to the accident claimant had worked steadily and was not troubled with pains of any kind. He now claims that he has pain almost all of the time, particularly a gnawing pain in the back of his head, in his left ear, down his left shoulder and arm to the end of his fingers. He claims that when he sits still he is quite comfortable, but if he moves around he has considerable pain. He also claims that he has but little strength and when he attempts to lift anything he has pain all the way down his arm; that he has been lame in his left leg ever since the time of the accident.

Claimant has had but little education, always worked as a laborer, and never had any previous injury, except that when he was twenty-one years of age he sustained an injury to his left knee. He claims he is now unable to do any substantial amount of work, but states that he putters around the house a little, mows the lawn, and pulls weeds in the garden sometimes, but that it tires him to do so. He also claims that he does not sleep well.

The evidence in the record on the question as to the extent of claimant's disability consists of his own testimony, the testimony of Dr. Leslie E. Bovik, the attending physician, who was called by and testified on behalf of the claimant; Dr. Julius Brans who was called by the claimant and testified with reference to the X-rays in evidence; and Dr. H. B. Thomas who was called by the respondent.

Dr. Bovik in summing up his conclusions, stated: "This man may not have a permanent total disability. He might have a permanent 90% disability, at least for a common laborer. That would be based upon the kind of common labor that this man might have to pursue. Throwing him into the field of common laborers and all things connected therewith, I would say that he was not fit for such work."

Dr. Thomas was of the opinion that the claimant had a 20% disability of the neck. He was also of the opinion that the disability of the knee resulted from the injury sustained by claimant when he was twenty-one years of age, and was not service-connected. Dr. Thomas also was of the opinion that with the exception of the aforementioned disability of the neck and the disability of the knee, claimant ought to

be able to do as much now as he did before, taking into consideration his age changes.

Dr. Brams stated: "I think he certainly would have a permanent partial disability. As to the exact percentage I can't say. It would depend upon what type of work this man would do. If he does labor that is such that he subjects himself to greater possibility of injury to the spine, his degree of disability is that much greater. Certainly he is partially disabled, regardless of what he does."

The evidence discloses that there is a narrowing of the inner space between the fourth and fifth, and between the fifth and sixth cervical vertebrae; that there is some lipping of the vertebral bodies, and an arthritic condition involving the aforementioned joints; that such condition can be caused by trauma or by infection. The several X-rays disclose that the pathology is increasing.

Dr. Thomas stated that as a result of his examination he found considerable arthritis in both the cervical vertebrae and in the joint, with some lipping, some wearing away of the cartilages. It also appears from the evidence that the claimant had an arthritic condition prior to the time of the injury here in question. It is a fair conclusion from all of the evidence that the accident in question either caused the present condition of the claimant, or it aggravated a pre-existing condition, and thereby produced the claimant's present disability.

It is well settled in this State that in either of such events, the respondent is liable under the terms and provisions of the Workmen's Compensation Act. *Big Muddy Coal Co. vs. Ind. Com.*, 279 Ill. 235; *Rockford Traction Co. vs. Ind. Com.*, 295 Ill. 358; *Ohlson vs. Ind. Com.*, 357 Ill. 335; Angerstein's "The Employer and the Workmen's Compensation Act," Volume 1, page 93, Section 52.

From a consideration of all of the evidence in the record, it is clear that the claimant has been seriously and permanently injured. He claims that his disability is total. The medical testimony on both sides of the case appears to be to the effect that the disability at the time of the hearing was partial rather than total, the extent of such partial disability being variously estimated by the several witnesses.

We therefore find that as the result of the accident in question, the claimant sustained a permanent partial dis-

ability. However, there is no evidence in the record upon which we can base an award for such permanent partial disability.

Section 8, paragraph D of the Workmen's Compensation Act, relative to the amount of compensation payable for a permanent partial disability, provides as follows:

"If, after the injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall, except in the cases covered by the specific schedule set forth in paragraph (e) of this section, receive compensation, subject to the limitations as to time and maximum amounts fixed in paragraphs (b) and (h) of this section, equal to fifty per centum of the difference between the average amount which he earned before the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident."

The evidence shows that claimant's annual wages prior to the accident were \$1,200.00, but there is nothing to show what he has earned or is able to earn in some suitable employment after the accident.

There is evidence to show that while his superior officer was away on his vacation, claimant performed the duties of such officer and received the same compensation therefor as he earned prior to his injury. However, the only work he did was to drive around from place to place in an automobile and supervise the work done by others. Even such work was more than he was able to stand, and he had to return to the hospital for treatment. We therefore consider that such employment, constituted no criterion as to what claimant was able to earn after the accident.

In our consideration of cases under the Workmen's Compensation Act, we are required by Section 6, paragraph 6 of the Court of Claims Act to determine such cases "in accordance with the rules prescribed by the Act commonly called the Workmen's Compensation Act." The Court of Claims is so constituted that practice in this court necessarily must differ in material respects from practice before the Industrial Commission, and in matters of practice it is not possible for this court to follow in every respect the provisions of the Workmen's Compensation Act. In proceedings before the Industrial Commission, the usual practice is for the case to be heard in the first instance before the Arbitrator, and his decision is subject to review by the Industrial Commission, in accordance with the provisions of Section 19 of the Com-

pensation Act, which section authorizes the taking of additional testimony on the hearing on review. We have no authority to appoint an arbitrator, or to designate one member of the court as an arbitrator to hear the case in the first instance. Nevertheless, we feel that either party to a compensation case in this court is entitled to a hearing on review, and to offer additional testimony on such hearing, in all respects as provided by Section 19 of the Workmen's Compensation Act.

Award is therefore denied, but claimant is given the right to file a petition for review within the time and in the manner set forth in Section 19 of the Workmen's Compensation Act. The evidence heretofore taken, and now filed in this court will stand as the agreed statement of facts or transcript of the record required to be filed pursuant to the provisions of paragraph B of Section 19 of the Act.

OPINION ON REVIEW.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court.

This cause again comes before the court on claimant's petition for review, pursuant to the provisions of paragraphs (b) and (e) of Section 19 of the Workmen's Compensation Act.

An opinion was filed herein on March 25th, 1938, in which the court found that as the result of the accident in question, claimant was temporarily totally disabled, and also sustained a permanent partial disability, but award was denied for the reason that payments had been made to claimant in excess of the amount due him for temporary total disability, and there was no evidence in the record from which a computation could be made of the amount to which he was entitled for permanent partial disability under the provisions of paragraph (d) of Section 8 of the Workmen's Compensation Act.

Since the filing of the petition for review, further proceedings have been had, from which it appears that claimant can now do light work, and is now able to earn the sum of \$10.00 per week.

The facts with reference to the accident in question, the nature and extent of claimant's injury, and the payments heretofore made to him are fully set forth in the original opinion of the court.

From the present record it appears that all medical, surgical and hospital services were furnished by respondent; that claimant was temporarily totally disabled for the period of 43 2 7 weeks; that the average amount which claimant earned before the accident was \$23.08 per week, and the average amount which he is able to earn in some suitable employment after the accident is \$10.00 per week; that subsequent to the accident, respondent paid to claimant for wages and compensation the total amount of \$916.66; that of such amount the sum of \$214.31 was paid for productive time, and the remainder, to-wit, \$702.35, must be considered as compensation, and deducted in computing the amount now due the claimant.

Claimant is therefore entitled to recover the sum of \$499.52 for 43 2 7 weeks temporary total incapacity at \$11.54 per week, and in addition thereto, the sum of \$2,437.55 for 37 2 5 7 weeks permanent partial disability at \$6.54 per week. From the total of such amounts, to-wit, \$2,937.07, there must be deducted the sum of \$702.35 for compensation heretofore paid as above set forth, leaving a net amount of \$2,234.72.

The accrued compensation to June 20th, 1938, computed as above, is \$1,570.21, which amount, less the sum of \$702.35 heretofore paid as aforesaid, to-wit, \$867.86, is payable forthwith, and the remaining balance of compensation, to-wit, \$1,366.86 is payable in weekly installments of \$6.54 commencing June 27th, 1938.

Award is therefore entered in favor of the claimant for the sum of \$2,234.72, payable as follows, to-wit:

1) The sum of Eight Hundred Sixty-seven Dollars and Eighty-six Cents (\$867.86) forthwith;

2) The sum of Thirteen Hundred Sixty-six Dollars and Eighty-six Cents (\$1,366.86) in Two Hundred Nine (209) weekly installments of Six Dollars and Fifty-four Cents (\$6.54) per week commencing on June 27th, 1938.

This award being subject to the provisions of an Act entitled "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," approved July 3d, 1937 (Session Laws 1937, p. 83), and being by the terms of such Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided for in such Act.

(No. 3234-3237, Consolidated—Claims denied.)

GREAT NORTHERN CHAIR CO., No. 3234 AND DENNIS BROS. CO., No. 3237, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 20, 1938.

Claimants, pro se.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

MOTOR VEHICLE LICENSE FEE—claim for refund—when use of vehicle discontinued during part of year for which issued—no provision in statute authorizing—must be denied. The facts in this case are similar and the principles involved the same as those in Freeport Floral Co., etc. vs. State, 9 Court of Claims Reports, page 149 and the opinion in that case is decisive herein.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court.

Above cases involve similar states of fact, and the same principles of law, and are therefore combined for the purposes of this hearing.

On January 22d, 1938 the Great Northern Chair Co. paid to respondent the sum of Twenty-four (\$24.00) Dollars as a license fee and tax for 1938 on its Dodge truck. On March 9th, 1938 this claimant sold said truck, and now asks for a refund of the pro rata share of the license fee and tax paid by it as aforesaid, for the unexpired portion of the license period.

Dennis Bros. Inc. paid the sum of Twelve Dollars (\$12.00) as a license fee and tax for 1938 on its Ford truck. On March 12th, 1938 this claimant sold said truck, and now asks for a refund of the pro rata share of the license fee and tax paid by it as aforesaid, for the unexpired portion of the license period.

The Attorney General has entered a motion to dismiss, in each case, for the reason that this court has no authority to allow an award under the facts set forth in the complaint.

The general rule of law relative to the refunding of the unearned portion of a license fee, is set forth in 37 Corpus Juris, page 255, section 130, as follows:

Where the fee or tax which has been paid was not illegal or unauthorized, it cannot be recovered back, irrespective of whether its payment was voluntary or involuntary, and although the method of its collection was irregular."

The identical question here involved has been considered by this court in a number of cases, and we have uniformly held that under the facts above set forth, claimants have no right to an award. *Dealers Transport Co. vs. State*, 8 C. C. R. 510; *Freeport Floral Co. vs. State*, 9 C. C. R. 149; *Phillips vs. State*, No. 3091, decided September Term, 1937; *Eaid vs. State*, No. 3157, decided January Term, 1938.

In the case of *Phillips vs. State*, No. 3091, we said:

"There is no provision of the Motor Vehicle Act, or any other Act, which authorized a return of a license fee under the facts set forth in the complaint. Had the legislature intended that licensees should be entitled to a return of the license fees paid by them, in the event of a sale of the licensed car, they would undoubtedly have made provision to that effect."

For the reasons above set forth the motion of the Attorney General in each case must be allowed.

Motion to dismiss allowed in each case and case dismissed.

(No. 3203—Claim denied.)

HARRY LAURENCE, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 20, 1938.

PHILIP S. ROSENTHAL, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—filing application for compensation—within one year after date of injury, or date of last payment of compensation, condition precedent to jurisdiction of court. Where the record shows that no application for compensation was filed within one year after the date of the injury, for which same is sought, and that no compensation was paid therefor, under the Workmen's Compensation Act, the court is without jurisdiction to proceed with hearing on claim filed thereafter.

SAME—furnishing medical services not payment of compensation, under. Furnishing of medical services by employer, is not payment of compensation within meaning of Workmen's Compensation Act.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court.

On February 10th, 1938 claimant filed his complaint herein in which he alleges that prior to and on December 7th, 1936 he was in the employ of the respondent as a fireman and general maintenance man at the 122d Field Artillery Armory,

234 East Chicago Avenue, Chicago, Illinois; that on said date, while engaged in drawing out clinkers from the firebox, the firing iron bent, whereby the back portion of both of his hands came in contact with the hot clinkers piled on the platform outside the firebox; that he was given first-aid treatment and other medical treatment; that after said accident he continued to work for the respondent, but was placed on watch or guard duty, which did not necessitate the use of his hands; that he continued on such guard duty until June 9th, 1937 and was paid his regular monthly salary of \$90.00 per month; that on the last mentioned date he was released on account of a reduction in personnel; that for a period of twenty-eight (28) weeks after June 9th, 1937 he was temporarily disabled from engaging in his usual and customary occupation; that during said last mentioned period, regular medical treatments were required and obtained on account of the condition of his hands;—and claimant, in said complaint, makes claim for compensation for temporary total disability for said period of 28 weeks.

The Attorney General filed a motion to dismiss, for the reason that the complaint fails to show that claim for compensation was made within six months after the accident, and for the further reason that application for compensation was not filed within one year after the date of the injury, as required by Section 24 of the Workmen's Compensation Act.

Thereafter claimant filed his amended complaint, in which he alleges that the respondent was notified of the accident immediately thereafter, and that a claim for compensation was made within six months after the accident.

Upon motion of the Attorney General, the motion to dismiss the original complaint was permitted to stand to the complaint as amended.

The amended complaint disposes of the objection that claim for compensation was not made within six months after the accident, but the objection that application for compensation was not filed within one year after the date of the injury or within one year after the date of the last payment of compensation remains to be considered.

Claimant contends that the rendering of medical services by the State for twenty-eight (28) weeks after June 9th, 1937, constituted a payment of compensation within the meaning of the Workmen's Compensation Act, and that therefore ap-

plication for compensation was filed within one year after the last payment of compensation.

In 1925 Paragraph (a) of Section 8 of the Workmen's Compensation Act was amended so as to provide that the furnishing by the employer of medical, surgical or hospital services shall not be construed to admit liability on the part of the employer to pay compensation, "and the furnishing of any such services or appliances by the employer shall not be construed as payment of compensation." Prior to such amendment our Supreme Court had held in a number of cases that the furnishing of medical, surgical or hospital services constituted the payment of compensation. However, such has not been the law since the amendment of 1925. *Lewis vs. Ind. Com.*, 357 Ill. 309-314.

In Angerstein's "The Employer and the Workmen's Compensation Act," page 481, Section 261, the author says:

"The furnishing of such services, not being a payment of compensation, should not in any way affect the period of time within which claim should be made or claim be filed."

Our Supreme Court has held in numerous cases that the making of application for compensation within one year after the date of the injury or the last payment of compensation is jurisdictional, and a condition precedent to the right to maintain an action under the Compensation Act. *City of Rochelle vs. Ind. Com.*, 332 Ill. 386; *Chicago Board of Underwriters vs. Ind. Com.*, 332 Ill. 511; *DuQuoin School District vs. Ind. Com.*, 329 Ill. 543; *Inland Rubber Co. vs. Ind. Com.*, 309 Ill. 43; *Bushnell vs. Ind. Com.*, 276 Ill. 262.

Inasmuch as the claim was not filed within the time limited by the Compensation Act, the motion of the Attorney General must be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 3151—Claimant awarded \$216.00.)

VICTOR WEIDNER, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 20, 1938.

HARRIS & JAFFE and IRVING PROCTOR, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNER, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT when award for disfigurement may be made under. Where it appears that employee of State sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra hazardous employment, resulting in serious and permanent disfigurement to his face and neck, an award for same may be made, in accordance with the provisions of the Act, upon compliance with the terms thereof.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Prior to and on December 11, 1936, claimant was in the employ of the respondent as a laborer in the Division of Highways, Department of Public Works and Buildings. On the date aforementioned, he was working with a tarring crew on Harlem Avenue just north of Higgins Road in Cook County. While hooking the asphalt heating kettle onto the truck, claimant's foot slipped on the ice, the kettle tipped, and the hot asphalt spilled on him as he fell to the ground, whereby he received second degree burns about the left eye, left nostril, left ear, left side of face, neck and right wrist.

He was taken to St. Francis Hospital in Evanston where he remained until December 17th, 1936 when he returned to his home.

He was temporarily totally disabled from December 11th, 1936 until February 18th, 1937.

Respondent paid bills for medical services in the amount of Eighty-nine Dollars (\$89.00), and hospital bills in the amount of Twenty-six Dollars (\$26.00), and in addition thereto, paid the claimant the sum of One Hundred Fifteen Dollars and Twenty Cents (\$115.20) for temporary total disability.

No further claim is made for temporary total disability, but claimant asks for compensation for serious and permanent disfigurement to his hand, head, neck and face, pursuant to the provisions of paragraph A, Section 8 of the Workmen's Compensation Act of this State.

Claimant was personally present in court and submitted to a physical examination.

Claimant was in the employ of the respondent for less than a year, and his annual earnings computed in accordance with Section 10 of the Workmen's Compensation Act, were Eight Hundred Dollars (\$800.00), and his average weekly wage was Fifteen Dollars and Thirty-eight Cents (\$15.38). He had two children under the age of sixteen years at the time of the accident.

From the evidence in the record and a personal examination of claimant, we find that although there is a slight discoloration on claimant's right wrist, it does not constitute a serious disfigurement within the meaning of the Compensation Act. We further find that claimant has sustained a serious and permanent disfigurement to the face and neck, and in accordance with the provisions of 'Section 8-C' of the Workmen's Compensation Act, is entitled to compensation in the sum of Two Hundred Sixteen Dollars (\$216.00), payable at the rate of Twelve Dollars (\$12.00) per week, commencing February 18th, 1937.

The entire amount of such compensation having accrued at this time, award is entered in favor of the claimant for the sum of Two Hundred Sixteen Dollars (\$216.00).

This award being subject to the provisions of an Act entitled, "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," approved July 3d, 1937 (Session Laws 1937, p. 83), and being by the terms of such Act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from the appropriation from the Road Fund in the manner provided for in such Act.

(No. 3191—Claimant awarded \$46.92.)

HORST & STRIETER COMPANY, Claimant, vs. STATE OF ILLINOIS
Respondent.

Opinion filed June 20, 1938.

Claimant, pro se.

OTTO KERNER, Attorney General; MURRAY F. MUEHL,
Assistant Attorney General, for respondent.

SUPPLIES FURNISHED AND SERVICES RENDERED—*when award may be made for.* Where claimant has rendered services or furnished supplies to the State, on the order of an official authorized to contract for it, and submits a bill therefor within a reasonable time, and due to no fault or negligence on the part of claimant, same is not approved and vouchered for payment, before the lapse of the appropriation from which it is payable lapses, an award for the reasonable value of same may be made, where at the time expenditure was contracted there was sufficient funds remaining in appropriation to pay for same.

MR. JUSTICE YANTIS delivered the opinion of the court.

In the early part of the year 1935, the State of Illinois purchased a large number of Ford V-8 coaches through the authorized Ford dealer at Springfield, Illinois. These cars were then assigned to the several Highway Maintenance Police Districts, one of which was District No. 7 with headquarters at Rock Island, Illinois.

After the cars were placed in service, it was found that certain defects appeared. At that time the Division of Highways Maintenance Police decided that it would be best to have the replacements and service provided by the local authorized Ford dealer at Rock Island, thereby saving time and expense in bringing the cars to the Springfield Ford agency through whom they were purchased. The Horst & Strieter Company made application to the Ford Motor Company of Detroit, Michigan, to have certain replacements and services given at the expense of the Ford Motor Company. Those replacements and services were found to be a just charge against the Ford Motor Company, when the cars were brought in before the expiration of the guarantee period.

During the same period other replacements and services were provided by the Horst & Strieter Company, which in no way concerned the Ford Motor Company.

The Horst & Strieter Company kept all of its correspondence with the Ford Motor Company, invoices and bills on all the above materials and labor together until guaranteed replacements were all made. This, in a large measure, accounts for the delay in presenting the bills and invoices for payments.

All materials, service, and labor shown in the bill of particulars (invoices and bills) were provided by the Horst & Strieter Company and the charges made for each item is the regulation one made by Ford agencies.

The amount of services rendered by claimant on cars serviced by it for the State during the same period in which guaranteed replacements were being made, amounts to a total of \$46.92. This bill has not been paid for the reason that the appropriation out of which such payment could have been made had lapsed before the adjustment of accounts could be determined. It appears that at the time the appropriation lapsed there remained therein an unexpended bal-

ance sufficient to pay for the bill in question, and that such bill represents the usual customary and standard charges made for such services.

In conformity with the Opinion heretofore rendered in *Rock Island Sand & Gravel Company, vs. State*, 8 C. C. R. 165, and other cases,

"Where claimant has rendered services or furnished supplies to the State on the order of one authorized to contract for same and a bill is thereafter submitted within a reasonable time but, through no negligence of claimant, is not presented, approved or vouchered before the appropriation from which it is payable lapses, an award for the reasonable and customary value thereof will be made, if at the time the obligation was incurred there were sufficient funds unexpended in the appropriation therefor to pay said account,"

an award is therefore allowed in favor of claimant in the sum of \$46.92.

(No. 2873—Claimant awarded \$600.00.)

SYLVESTER STESKAL, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 21, 1938.

JAMES E. LONDRIGAN, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—claim for compensation for disfigurement under—proof of loss of earning power not necessary to sustain. In a claim for compensation for disfigurement, resulting from accidental injuries sustained by employee, arising out of and in the course of his employment, while engaged in extra hazardous employment, it is not necessary, in order to sustain such claim that it be shown that there is a loss of earning power by claimant.

SAME—same—what must be shown in—amount of compensation for, how determined. Disfigurement for which compensation may be had under the Workmen's Compensation Act, must be permanent and serious, and the amount of same is to be determined by agreement of the parties or decision of the court, there being no set rule for determining such amount, except the maximum amount provided in Act, for such disfigurement.

MR. JUSTICE LINSOTT delivered the opinion of the court:

The claimant, Sylvester Steskal, was injured by reason of an accident arising out of and in the course of his employment in the Division of Highways, Department of Public Works and Buildings, on Christmas Day, 1935. The injury resulted in a total disability for several weeks and left several

scars disfiguring his face. At the time of his injury, he was engaged by the Highway Department plowing snow from the road. The snow plow broke causing the truck to telescope throwing him into the windshield and severely cutting his face and head.

No question arises as to the jurisdiction of the court and the only question ever open was to determine the amount claimant should be allowed for the scars upon his face.

The claimant appeared before the court in person and we found a scar on his right cheek, about 2½ to 3 inches long, and rather irregular in shape, with rather jagged edges; also found a scar on his chin to the left of the center line about 1 inch long, and also creating rather a jagged appearance. There is also a scar on the left side of his face, a little to the front, and a little below the cheek bone, extending upwards and downwards. This also is about one inch long. There is a scar to the right of the center line on his forehead, maybe an inch below and a half an inch long. That is more regular.

At the time of his injury, claimant was married, and had one child who was eight years old at the time of the taking of the deposition on July 10, 1936. At the time of his injury, he was receiving One Hundred Twenty Dollars (\$120.00) per month, and at the time of the accident he was twenty-seven years old.

Claimant is not claiming any compensation for loss of time. He had been paid his full wages for the three weeks that he was off. Claimant's doctor and hospital bills amounting to Twenty-five Dollars (\$25.00) and Fifteen Dollars and Thirty Cents (\$15.30) respectively were paid by the State, and he is now asking the sum of One Thousand One Hundred Fifty-two Dollars and Eighty Cents (\$1,152.80) as compensation.

This court has held in numerous cases that in the maintenance of its hard-surfaced roads, the State is engaged in an extra hazardous business or enterprise within the meaning of Section 3 of the Workmen's Compensation Act.

Munhart vs. State of Illinois, 8 C. C. R. 356 (357).

A highway maintenance patrolman injured in an accident arising during the course and out of his employment may receive compensation therefor.

Foster vs. State of Illinois, 8 C. C. R. 340.

Section 8, paragraph b, provides:

If the period of temporary total incapacity for work lasts more than six working days, compensation equal to fifty per centum of the earnings, but

not less than \$7.50 nor more than \$15.00 per week, beginning on the eighth day of such temporary total incapacity and continuing as long as the temporary total incapacity lasts, but not after the amount of compensation paid equals the amount which would have been payable as a death benefit under paragraph (a), Section 7. If the employee had died as a result of the injury at the time thereof, leaving heirs surviving as provided in said paragraph (a), Section 7: *Provided*, that in the case where the temporary total incapacity for work continues for a period of more than thirty days from the day of the injury, then compensation shall commence on the day after the injury."

The Act further provides:

"For any serious and permanent disfigurement to the hand, head or face, the employee shall be entitled to compensation for such disfigurement, the amount fixed by agreement or by arbitration in accordance with the provisions of this Act, which amount shall not exceed one-quarter of the amount of the compensation which would have been payable as a death benefit under paragraph (a), Section 7, if the employee had died as a result of the injury at the time thereof, leaving heirs surviving, as provided in said paragraph (a), Section 7: *Provided*, that no compensation shall be payable under this paragraph where compensation is payable under paragraph (d), (e) or (f) of this section, compensation for such disfigurement may be had under this paragraph."

The claimant avers in his claim for compensation that he was paid his salary during his temporary total disability. He is asking for the sum of One Thousand One Hundred Fifty-two Dollars and Eighty Cents (\$1,152.80), which is one-fourth the amount that his dependents would have been entitled to had he been killed. Under Paragraph D of said Section 8, he would have been entitled to compensation, (subject to the limitations of Paragraphs B and H of said Section 8), equal to fifty percentum of the difference between the average amount which he earned before the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident.

From the record it appears that he is earning as much now as he was prior to the time of the accident, if not a little more, and Section B provides that if his temporary total incapacity for work lasts more than six working days, he is entitled to compensation equal to fifty percentum of the earnings but not less than \$7.50 nor more than \$15.00 per week, beginning on the eighth day of such temporary total incapacity and continuing as long as the temporary total incapacity lasts, but not after the amount of compensation paid equals the amount which would have been payable as a death benefit under paragraph (a), Section 7, if the employee had

ded as a result of the injury at the time leaving heirs surviving. His temporary total incapacity lasted less than thirty days and he did receive his full salary.

The record shows that he was absent from work from December 25th until January 20th and he received One Hundred Two Dollars and Fifty-seven Cents (\$102.57). Under the act, he was entitled to receive from the 8th day after the accident until the 26th day inclusive, at the rate of Fifteen Dollars (\$15.00) per week or a total of Forty Dollars and Seventy-one Cents (\$40.71), and therefore was over-paid Sixty-one Dollars and Eighty-six Cents (\$61.86).

As we construe the law, the disfigurement must be serious and permanent. The scars above outlined are visible a distance from twenty to twenty-five feet. The healing period has long since passed. The basis for compensation for disfigurement is that the disfigurement has in some way affected the employee's earning capacity either in directly affecting his ability to earn in the employment in which he is engaged, or in interfering with his ability later to obtain employment. It is sometimes said that the disfigurement may cause a workman to be at a disadvantage in the labor market by reason of the hideousness or seriousness of the disfigurement, or it may make him more timid in his application for employment. Obviously, a description as to all possible disfigurements could not be made in the act, so the general provision was made that the disfigurement must be permanent and serious and the determining of the proper amount payable is left to the parties or the commission within certain maximum limits.

The statute does not require that there shall be a showing of loss of earning power before compensation can be made for a disfigurement, and we are not authorized to read such provision into the statute. The law in this respect is well stated in the case of *Williams Co. vs. Industrial Com.*, 303 Ill. 352.

Ugly scars on the face are often more noticeable than disfigurement to the hands. Disfigurement to be considered serious need not cause a decrease in the earning capacity but it must be such disfigurement as to interfere with his securing work in his usual line. In this particular case it appears to us that that is claimant's position. There is no set rule for determining the amount which should be paid in dis-

figurement cases, except the limit hereinabove referred to. We must, therefore, rely upon common sense and fairness of attitude.

With this in mind, we fix the amount of the award at Six Hundred Dollars (\$600.00), in addition to all amounts heretofore paid to said employee.

This award being subject to the provisions of an Act entitled, "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," Approved July 3, 1937 (Sess. Laws 1937 p. 83), and being, by the terms of such Act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from the appropriation from the Road Fund in the manner provided for in such Act.

(No. 3162—Claimant awarded \$140.00.)

MARTIN PIEFFER, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 8, 1938.
Award vacated September 13, 1938.

(Nos. 3131-3140-3154-3174-3179—Claimants awarded \$441.00.)

VAN V. LAIN AND WM. V. V. LAIN, CO-PARTNERS, DOING BUSINESS AS LAIN & SON, NOS. 3131, 3140 AND 3154, O. L. MARSTON, NO. 3174 AND DANIEL T. O'REGAN, NO. 3179, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 8, 1938.
Awards vacated September 13, 1938.

(Nos. 3175-3176-3177, Consolidated—Claimants awarded \$370.00.)

EDWARD R. WEERTS, NO. 3175, VICTOR A. KARCHER AND FRANK A. KARCHER, DOING BUSINESS UNDER AND BY THE FIRM NAME AND STYLE OF KARCHER BROTHERS FUNERAL HOME, NO. 3176 AND UNION CO-OPERATIVE UNDERTAKING ASSOCIATION, NO. 3177, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 25, 1938.
Award vacated September 13, 1938.

(No. 3220—Claimant awarded \$199.00.)

F. J. FESSANT AND ROBERT C. CLARK, Claimants, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed May 11, 1938.
Award vacated September 13, 1938.

(No. 3214—Claimant awarded \$70.00.)

N. W. WILSON, DOING BUSINESS AS WILSON FUNERAL SERVICE, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 11, 1938.
Award vacated September 13, 1938.

(No. 3213—Claimant awarded \$95.00.)

N. W. WILSON, DOING BUSINESS AS WILSON FUNERAL SERVICE, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 11, 1938.
Award vacated September 13, 1938.

(No. 3205—Claimant awarded \$100.00.)

WALTER G. SCOTT, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 11, 1938.
Award vacated September 13, 1938.

(No. 3245—Claimant awarded \$797.00.)

NAPERVILLE NURSERIES, INC., Claimant, vs. STATE OF ILLINOIS.

Opinion filed September 14, 1938.

MECARTNEY & VAIL, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

SUMMARY— lapse of appropriation out of which could be paid—before payment—when award for may be made. The facts in this claim are the same as those in *Metropolitan Electrical Supply Company vs. State*, No. 3270, *infra*, and the opinion in that case is decisive herein.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant, an Illinois corporation, at the request of O. J. Schneider, District Landscape Engineer, Division of High-

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v. STATE OF ILLINOIS.

ways, Department of Public Works and Buildings, of the State of Illinois, furnished to the Highway Division at Elgin, Illinois certain nursery stock as shown by itemized statement filed herein. The nursery stock was duly delivered, accepted by the Highway Department and used by it along the highways of the State. Claimant submitted an invoice to the Division of Highways on March 21, 1938 but said invoice was not vouchered for payment, for the reason that on September 30, 1937 the appropriation from which said items were payable had lapsed. It appears that sufficient funds remained in the appropriation at that time from which said account could have been properly paid, and further that the bill submitted for such nursery stock was the customary and reasonable charge therefor. Claimant is legally entitled to payment of the amount of its bill and an award is hereby made in favor of claimant therefor, in the sum of Seven Hundred Ninety seven (\$797.00) Dollars.

(No. 3270—Claimant awarded \$28.16.)

METROPOLITAN ELECTRICAL SUPPLY COMPANY, A CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 14, 1938.

J. B. LUSE, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

SUPPLIES—lapse of appropriation out of which could be paid—before payment—when award for may be made. Where it appears that State received merchandise, as ordered, quality, quantity and prices thereof, being in accordance with order, and that bill therefor, through no negligence of claimant, was not presented before lapse of appropriation out of which it could be paid, and that at time of said lapse there was sufficient funds therein to pay same, an award for the price thereof may be made, on claim filed within a reasonable time.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

From the stipulation of facts herein it appears:

1. That on or about the 16th day of July, A. D. 1935, the claimant delivered to the respondent at the Chicago State Hospital, Chicago, Illinois, certain merchandise of the value

of Twenty-eight Dollars and Sixteen Cents (\$28.16), pursuant to a certain purchase order issued by the proper officer of said Chicago State Hospital.

2. That on September 6th, 1935, the managing officer of said Chicago State Hospital requested claimant to forward invoice in triplicate by return mail, but same was not received until December 7th, 1935, at which time the appropriation for the 1933-1935 biennium, out of which the bill should have been paid, had lapsed, and claimant was advised to file its claim in this court.

At the time of the issuance of such purchase order, and at the time of the delivery of the merchandise in question, there were sufficient funds remaining unexpended in the proper appropriation to pay for the same.

We have held in numerous cases that where materials or supplies have been properly furnished to the State, and a bill therefor has been submitted within a reasonable time, but the same was not approved and vouchered for payment before the lapse of the appropriation from which it is payable, without any fault or neglect on the part of the claimant, an award for the reasonable value of such materials or supplies will be made, where at the time the expenses were incurred there were sufficient funds remaining unexpended in the appropriation to pay for the same. *Rock Island Sand & Gravel Co. vs. State*, 8 C. C. R. 165; *Indian Motorcycle Co. vs. State*, 9 C. C. R. 526; *Wabash Telephone Co. vs. State*, No. 3105, decided at the January Term, 1938, of this court; *Goodyear Tire & Rubber Co. vs. State*, No. 3155, decided at the March Term, 1938, of this court.

This claim comes within the requirements above set forth, and award is therefore entered in favor of the claimant for the sum of Twenty-eight Dollars and Sixteen Cents (\$28.16).

(No. 3137—Claim denied.)

ANNIE NOLAN, WIDOW OF WILLIAM LEON NOLAN, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 14, 1938.

DAVID ALSWANG, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—totally blind person—not employee within. A totally blind person is not an employee within the meaning of the Workmen's Compensation Act, such person being specifically excepted from the definition of employee, in paragraphs 1 and 2 of Section 5 of the same, and if injured no claim for compensation will lie thereunder.

SAME—same—elimination of as employees by amendments to paragraphs 1 and 2 of Section 5 of—apparent purpose of amendments. The apparent purpose of the amendments to paragraphs 1 and 2 of Section 5 of Workmen's Compensation Act, eliminating totally blind persons, as employees under same was to benefit such persons and enable them to obtain employment, which in all possibility they would otherwise be unable to obtain, if classed as employees under Act, because of their affliction and the great risk of accidental injury which employers would hesitate to assume.

SAME—same—same—not unreasonable or in violation of due process or special legislation clauses of Constitution. The so called "Due Process" and "Special Legislation" clauses of the Constitution of Illinois do not prohibit reasonable classifications for legislative purposes, and a statute cannot be considered "class legislation" merely because it affects one class and not another, provided it affects all members of the same class alike, and inasmuch as amendments to paragraphs 1 and 2 of Section 5 of Workmen's Compensation, eliminates all totally blind persons as employees thereunder, there is no violation of such constitutional provisions.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

The claimant, Annie Nolan, is the widow of William Leon Nolan, who, in his lifetime, was employed by respondent at the Illinois Industrial Home for the Blind, at Chicago, Illinois.

On August 18th, 1937 said William Leon Nolan, who was then seventy-eight (78) years of age, and totally blind, was working in the broom factory operated by respondent in connection with said Illinois Industrial Home for the Blind. He was employed on the second floor of the building, and apparently intended to go to the floor below. In so doing he missed his footing and fell down the stairs, whereby he sustained injuries from which he died on September 1st, 1937.

It is conceded that sharp cutting tools were used in connection with the work done at such broom factory; that the accident in question arose out of and in the course of the employment of said decedent; that his superior officer had immediate notice of the accident; and that claim for compensation was made within the time required by the Workmen's Compensation Act.

Claimant asks for an award under the terms and provisions of the Workmen's Compensation Act of this State. Re-

spondent contends that said William Leon Nolan was not an "employee of the State" within the meaning of those words as used in the Compensation Act, and that therefore claimant is not entitled to an award.

Section Three (3) of the Workmen's Compensation Act provides that the Act shall apply automatically and without election to "all employers and all their employees" engaged in any department of the enterprises or businesses there enumerated.

Section Five (5) of such Act defines the term "employee", and provides that: "the term 'employee' as used in this Act shall be construed to mean: First: Every person in the Service of the State . . . under appointment or contract of hire, express or implied, oral or written, *except any totally blind person.*" . . .

Second: Every person in the service of another under any contract of hire, express or implied, oral or written . . . *but not including any totally blind person,*" etc.

Claimant contends that the clause excepting any totally blind person is unconstitutional; that the elimination of totally blind persons as employees is an unreasonable discrimination, and is in violation of Section Two (2) of Article Two (2), and of Section Twenty-two (22) of Article Four (4) of the Constitution of this State, which sections are more commonly known as the "Due Process" clause and the "Special Legislation" clause of the Constitution; that by reason thereof the claimant should be allowed an award as an employee under the provisions of the Act.

Our Supreme Court has had occasion in numerous instances to consider the aforementioned constitutional provisions. It is well settled that a statute which arbitrarily classifies individuals and subjects them to peculiar rules or imposes upon them special burdens and obligations from which other individuals similarly situated are exempt, is in violation of the Constitution.

It is also well settled that such constitutional provisions do not prohibit reasonable classifications for legislative purposes, and a statute cannot be considered "class legislation" merely because it affects one class and not another, provided it affects all members of the same class alike.

In the case of *Casparis Stone Co. vs. Ind. Board*, 278 Ill. 70, our Supreme Court, in passing upon the constitutionality

of the Workmen's Compensation Act of this State, on page 80 said:

"Under the doctrine of equal protection of the laws class legislation is prohibited by the Federal constitution, but there is no prohibition against a reasonable classification of persons and things for the purpose of legislation (*Gulf, Colorado and Santa Fe Railway Co. vs. Ellis*, 165 U. S. 150.) Such classification, however, must not be capricious or arbitrary but must be reasonable and natural and based upon some principal of public policy, but if the classification is not wholly unreasonable and arbitrary and the statute is uniform in its operation on all the members of the class to which it is made applicable, no one is denied the equal protection of the laws guaranteed by the Federal constitution. (*American Sugar Refining Co. vs. Louisiana*, 179 U. S. 89; 6 R. C. L. 371, 379, 379.) In the exercise of its power to make classifications for the purpose of enacting laws over matters within its jurisdiction the State is permitted a wide range of discretion. The question of classification is primarily for the State legislature, and only becomes a judicial question when the legislative action is clearly unreasonable (*Mogoun vs. Illinois Trust and Savings Bank*, 170 U. S. 283.) The provisions of the constitution with reference to due process of law and equal protection of the law merely require that all persons subjected to such legislation shall be treated alike under like circumstances and conditions. (*Central Lumber Co. vs. South Dakota*, 226 U. S. 157.) The reasoning of these decisions as to classifications under the various State laws has been repeatedly approved by this court. (*City of Chicago vs. Bowman Dairy Co.*, 234 Ill. 294; *City of Chicago vs. Schmidinger*, 243 Ill. 167; *Ritchie & Co. vs. Wayman*, 244 id. 509; *People vs. Henning Co.*, 260 id. 554.) We think the classification provided for in this law bears a reasonable relation to the objects sought to be accomplished and is uniform as to all members of the class to which it is made applicable, and that the law is not unconstitutional because of such classification."

In the case of *People vs. City of Chicago*, 337 Ill. 101, it was contended that Section 12 of the Civil Service Act relating to cities, was unconstitutional in that it denied laborers the right to a hearing before their discharge from employment, whereas other persons coming under the provisions of the Act were entitled to such hearing. In that case the Supreme Court, on page 104, said:

"It may not be doubted that a law applicable only to one class of individuals must rest upon some actual, substantial difference between that class and other individuals of the State or community when considered with reference to the purposes of the legislation. It is necessary that there be a basis in reason and principle for regarding such class of individuals as a distinctive or separate class. The fact that the act discriminates against an individual or group is not of itself sufficient to render it invalid. Such discrimination, to violate constitutional guaranties, must be unreasonable and wanting in that basis required by law. A class may not be created by the arbitrary declaration of an act of the legislature and endowed with special legislative favors or subjected to special burdens. The classification, in such

stance, must be based on a substantial and reasonable distinction in the situation and circumstances of the individuals who are embraced therein from those not so included, and the ground of such classification and distinction must have relation in reason and in principle to the privileges or burdens proposed to be granted to or laid upon such individuals as a class by the proposed legislation."

In the case of *Crews vs. Lundquist*, 361 Ill. 194, in considering the same question, our Supreme Court, on page 197, said:

"In considering the reasonableness of the classification made by the General Assembly, courts will not attempt to assert their judgment on that matter as against the judgment of the General Assembly, nor refuse to uphold legislation merely on the ground that their judgment in this regard differs from that of the General Assembly. An act of the General Assembly is not to be regarded as class legislation merely because it affects one class and not another, provided it affects all members of the same class alike. Classification of persons or objects for purposes of legislative regulation is not open to constitutional objection if it be not arbitrary but is based upon some substantial difference bearing proper relation to the classification."

In the case of *The People vs. Ladwig*, 365 Ill. 574, the court, in considering the "due process" clause, said on page 585:

"Whether an act is open to the charge that it denies equal protection of the laws depends, not on whether the parties affected have been discriminated against, but whether there is a reasonable basis for the classification made by the statute".

In the case of *Punke vs. Village of Elliott*, 364 Ill. 604, the court, in discussing the question here involved, said on page 611:

"The classification of objects and subjects for legislative purposes rests in the legislative department. It is permitted a wide range of discretion in the exercise of such power. (*Magoun vs. Illinois Trust and Savings Bank*, 170 U.S. 283, 42 L. ed. 1037). The judicial department may not interfere with such classification when made unless it is clearly unreasonable. (*Caspary Stone Co. vs. Industrial Board*, 278 Ill. 77.) Nor is it necessary that classification be accurate, scientific, logical or harmonious, so long as it is not arbitrary and will accomplish the legislative design."

There are numerous other decisions of our Supreme Court to the same effect. The difficulty arises not in stating the principles of law, but in the application of such principles.

It therefore becomes necessary to consider whether there was some substantial reason for the classification made by the

legislature or whether such classification was entirely arbitrary.

The provision of the Compensation Act under consideration was inserted in such Act by an amendment effective July 1st, 1929. In considering such amendment, Angerstein in his work on 'The Compensation Act, 1930 edition, page 304, Section 139, says:

"By amendment to Section 5, effective July 1, 1929, to the first paragraph of Section 5, any totally blind person is specifically excepted in the construction of the term "employee". Any such person therefore, employed in the service of the State, county, city * * * is not an employee within the meaning of the act and in the event of accidental injury or death arising out of and in the course of employment would not be entitled to compensation. A similar amendment was made at the same time to the second paragraph of Section 5 so that any totally blind person is not an employee under the act or entitled to compensation.

"There are of course no cases construing this provision and the only plausible reason for such amendment probably is that the legislature must have considered that with such an amendment a person totally blind might be more apt to secure some employment and earn some wage or remuneration, whereas without such amendment it would be highly improbable that any employer would give employment to any such person because of the great risk of accidental injury. It might also have been considered that if any such person had become totally blind as a result of accidental injury arising out of and in the course of his former employment he would have been entitled to a permanent total disability award in such case".

Notwithstanding the fact that the amendment in question worked a hardship in the present case, we cannot escape the conclusion that such amendment was enacted for the purpose of benefitting totally blind persons, and enabling them to obtain employment which, in all probability, they would otherwise be unable to obtain; that such amendment does not constitute an arbitrary and unreasonable classification, but was based upon what the legislature apparently considered good and sufficient reasons.

We therefore hold that the amendment in question is not subject to the objections here urged against it; that claimant's intestate was not an employee of the State within the meaning of those words as used in the Workmen's Compensation Act; and that therefore claimant is not entitled to an award under the provisions of such Act.

Award will therefore be denied and the case dismissed.

(No. 3936—Claimant awarded \$1,064.25.)

LEAH NEUBAUS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 14, 1938.

JOHNSON & POTTER, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—when award may be made under. Where it is found that employee of State, sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra hazardous employment, an award for compensation for such injuries will be made, in accordance with the provisions of the act, upon compliance with the terms thereof.

Mr. Justice YANTIS delivered the opinion of the court:

Claimant seeks an award of Two Thousand Twenty-five (\$2,025.00) Dollars for the total and permanent loss of use of his left arm, because of an injury incurred while employed by the respondent as an attendant at the Peoria State Hospital at Bartonville, Illinois.

While acting as such attendant on January 1, 1936, claimant was attacked by an inmate and thrown to the floor, causing a fracture of his left shoulder. Surgical and medical services were furnished him by respondent through the institution. A report from the Department of Public Welfare states that claimant received a fracture of the left clavicle at the junction of the outer with the middle third of the bone; that the function of his left arm and hand is markedly interfered with and that he is able to use it only slightly. Dr. Henry Knowles, who attended claimant, gives an opinion of fifty (50) per cent permanent disability of the use of the left arm. According to claimant's testimony he was nearly seventy-two years of age at the time he entered the employ of the hospital on July 7, 1933. At the time of the attack he was in Cottage 5C, being one of the locked buildings in which the more troublesome patients are kept. The injury arose out of and in the course of his employment and as an immediate result thereof, claimant was absent from his work for a period of one month up to February 1, 1936, during which time he paid his regular salary which was for non-productive time. The State furnished all medical and surgical services required, and after returning to work on February 1, 1936

claimant continued to work until the 1st of February, 1937. During the year immediately preceding his injury Mr. Neuhaus received a salary of Fifty-eight (\$58.00) Dollars per month plus commutation for board, room and laundry of Twenty-four (\$24.00) Dollars, making a total monthly salary of Eighty-two (\$82.00) Dollars, or an annual salary of Nine Hundred Eighty-four (\$984.00) Dollars, or an average weekly wage of Eighteen and 92/100 (\$18.92) Dollars.

There was no break in claimant's hand, wrist or elbow; the only break being in the collar bone. He is unable to lift a weight in his left hand or to lift the arm normally.

Dr. Henry M. Wilson, of Peoria, called by claimant, testified that he had examined claimant and that the latter's left arm could be moved backwards only about ten (10) degrees and forward about thirty (30) degrees; that he had a decided loss of grip and restricted flexion of the hand; that there is an over-lapping fracture of the left clavicle and a fragment of bone broken off the first left transverse process of the thoracic vertebra which could only have occurred from some very violent blow; that the present condition is the result of the traumatic injury to the soft part of the shoulder; that such condition is permanent, and that claimant cannot use the arm in pursuit of any gainful occupation. Dr. Wilson further testified that there was some limitation both as to supination and pronation in the elbow joint and loss in flexion of about twenty (20) per cent in the wrist joint.

At the time the employment of Mr. Neuhaus was terminated a year after the accident then his son was employed as an attendant in his place. At that time Dr. Walter H. Baer, managing officer of the Peoria State Hospital stated that claimant was being released because of physical incapacity; that he was seventy-five years of age, had a mature cataract on the left eye and the beginning of one on the right, that his hearing was poor, that he had a large scrotal hernia, impaired muscle power of the left hand and arm and serious heart irregularity.

We find from the evidence the following:

1. That claimant had no children under sixteen years of age at the time of his injury.
2. That the accident arose out of and in the course of his employment.
3. That claimant and employer were at the time of the accident engaged in such work as to entitle claimant to the

benefit of the Workmen's Compensation Act of Illinois.

4. That he has heretofore been overpaid for temporary total disability, the sum of \$34.11. This sum having been for non-productive time should be deducted from any award hereinafter made.

5. That plaintiff has suffered a fifty (50) per cent loss of use of the left arm as a result of the accident in question.

6. That proper notice of the accident and demand for compensation has been given.

7. That claimant is entitled to an award at the rate of \$9.46 per week for one hundred twelve and one-half (112½) weeks for fifty (50) per cent loss of use of the left arm, as provided for under Section 8 (e), 13 and 17 of the Workmen's Compensation Act of Illinois.

An award is therefore hereby made in favor of claimant for the sum of One Thousand Sixty-four and 25/100 (\$1,064.25) Dollars for fifty (50) per cent partial permanent loss of use of his left arm. From said amount there should be deducted Thirty-four and 11/100 (\$34.11) Dollars for overpayment of temporary total disability heretofore made, leaving a balance of One Thousand Thirty and 14/100 (\$1,030.14) Dollars. This award would be payable on a weekly basis of Nine and 46/100 (\$9.46) Dollars per week, but as the entire amount has heretofore accrued since the accident, same is payable at the present time in one sum.

This award being subject to the provisions of an Act entitled, "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," approved July 3, 1937 (Sess. Laws 1937 p. 83), and being, by the terms of such act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from said appropriation from the General Revenue Fund in the manner provided for in such Act.

(No. 3247—Claim denied.)

WILLIAM H. JONES, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 14, 1938.

Claimant, pro se.

OTTO KERNER, Attorney General; MURRAY F. MILNE,
Assistant Attorney General, for respondent.

LIMITATIONS—jurisdiction—when claim barred. Where it appears from complaint that claim was not filed until after five years after same accrued, the claim is forever barred under the provisions of Section 10 of the Court of Claims Act, and the Court is without jurisdiction to make award.

SAME—conditional assurances of payment by State Department—do not toll running of. Where claimant alleges that State Department promised payment of his claim, whenever it had money for that purpose, such assurances, even if proven, are not sufficient to toll the running of the Statute of Limitations.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein represents that during the month of February, A. D. 1932 he was engaged by the Department of Public Works and Buildings of the State of Illinois to furnish certain plumbing, labor and material upon the 124th Field Artillery Armory, at Chicago, and pursuant thereto proceeded to furnish same as per statement attached to his complaint, in the amount of Seventy-nine and 94/100 (\$79.94) Dollars. The claim recites that request for payment was presented to the Department of Public Works and Buildings "on several occasions," but it does not state when the last of the work and material was furnished, or when the demand for payment was first made. The claim further recites that the said Department of Public Works and Buildings was unable to pay the bill as there were no funds available and that "the Department promised to pay the bill as soon as funds were available," and that the last of such promises was made on March 18, 1936.

The claim was filed April 22, 1938. The conclusion reached from the wording of the complaint is that the last of the materials and labor were in fact furnished in February, 1932.

The Attorney General has filed a motion to dismiss the complaint because more than five years have passed since claimant's right of action accrued and the claim is therefore barred under the provisions of Section 10 of the Act Creating the Court of Claims. (Par. 436, Ch. 37, Ill. Revised Statutes of 1937.)

The claim fails to state a sufficient cause upon which an award could be made. The debt due claimant matured on final delivery of material when the performance of the work was completed. (*Wolff Co., etc. vs. State*, 9 C. C. R. 41). The conditional assurance from the Department of Public Works

and Buildings that the claim would be paid whenever it had money for such purpose is not sufficient to toll the running of the statute. The motion of the Attorney General is allowed and the claim dismissed.

(No. 3121 - Claimant awarded \$853.40.)

JOHN F. FORD, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 14, 1938.

JOSEPH W. KOUCKY, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made for partial loss of use of hands.* Where it appears that employee of State sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra hazardous employment, resulting in partial loss of use of hands, an award for compensation may be made in accordance with provisions of act, upon compliance with terms thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant was employed as a guard at the Chicago State Hospital, at Dunning, Illinois. On August 27, 1937 one of the patients made an attack on one of the institution doctors. Claimant went to the latter's aid and in attempting to restrain the patient, the latter struck him over the hands with a shovel. Treatment was given claimant at the hospital and X-rays of his left hand revealed a fracture of the second metacarpal bone of the left hand in its middle third with some overriding of the distal fragment. The right hand was swollen. Claimant's left hand was placed in a cast and while in the cast claimant again hurt his hand and the swelling made the cast so painful that claimant removed same. Dr. Goldstein, of the institution staff, then placed claimant's left hand in a banjo splint. No definite evidence of bony pathology was disclosed with respect to the right hand by the X-ray. By reason of the overlapping of the bones in the left hand, the index finger has been shortened about one-half inch. There is a lump on the back of the hand and claimant cannot grip tightly because the index finger will not close tightly in the palm of the hand. A part of the present condition of the left hand is due to the premature removal of the cast by the plain-

tiff himself, and there is nothing in the record to show the circumstances under which he incurred the later injury which caused him to remove the cast. However, the testimony of both Dr. Goldstein and Dr. Adams substantiates the plaintiff's claim as to injury from the accident that arose out of and in the course of his employment at the hands of an inmate of the institution. The testimony in the record supports a finding of thirty (30) per cent total permanent disability of the left hand, and twenty (20) per cent permanent partial disability of the right hand. In his duties as a gardener claimant used sharp-edged cutting tools, and as an attendant he had the care of dangerous patients of the institution. His employment was within the terms of the Workmen's Compensation Act and his injury is compensable under that Act. He was an unmarried man and was receiving a salary of Sixty-three (\$63.00) Dollars per month plus maintenance valued at Twenty-four (\$24.00) Dollars per month, or an annual wage of One Thousand Forty-four (\$1,044.00) Dollars. His average weekly wage therefore was Twenty and 08/100 (\$20.08) Dollars. Under the provisions of Sub-paragraph 12, Sub-section (c) of Section 8 and Sub-paragraph 17 of the same Section of the Workmen's Compensation Act claimant is entitled to compensation as follows:

| | |
|---|-----------|
| For thirty (30) per cent partial loss of use of the left hand, fifty (50) per cent of his average weekly wage for 51 weeks | \$ 512.04 |
| For twenty (20) per cent partial loss of use of the right hand, fifty (50) per cent of his average weekly wage for 34 weeks | 311.36 |
| Total | \$ 823.40 |

Said award is payable on the basis of weekly payments of Ten and 04/100 (\$10.04) Dollars per week. As the accident occurred the 27th day of August, 1937, payment for fifty-four (54) weeks will have accrued by September 10, 1938, in the sum of Five Hundred Forty-two and 16/100 (\$542.16) Dollars. This amount should be paid to claimant at the present time and future payments made to him on the basis of Ten and 04/100 (\$10.04) Dollars per week for a period of thirty-one (31) weeks, commencing September 17, 1938 and continuing until the further sum of Three Hundred Eleven and 24/100 (\$311.24) Dollars has been paid to him.

An award is therefore hereby made in favor of claimant for the sum of Eight Hundred Fifty-three and 40/100 (\$853.40) Dollars, payable as follows:

Five Hundred Forty-two and 16/100 (\$542.16) Dollars for compensation accrued to September 10, 1938, and monthly payments thereafter covering a period of thirty-one (31) weeks, commencing on September 17, 1938 and continuing until the further sum of Three Hundred Eleven and 24/100 (\$311.24) Dollars has been paid.

This award being subject to the provisions of an Act entitled, "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," Approved July 3, 1937 (Sess. Laws 1937 p. 83), and being, by the terms of such act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from said appropriation from the General Revenue Fund in the manner provided for in such act.

(No. 3201—Claim denied.)

RAILWAY EXPRESS AGENCY, INCORPORATED, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 14, 1938.

JOHN A. DILL and EMIL SEERUP, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

MOTOR VEHICLE LICENSE FEE—*voluntarily paid.* License fee, voluntarily paid, with full knowledge of the facts, or opportunity to ascertain same cannot be recovered.

SAME—*paid under mistake of law*—cannot be recovered. Money voluntarily paid under mistake of law cannot be recovered.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

The complaint herein alleges in substance that at divers times during the months of August and September, A. D. 1937, the claimant made application to the Secretary of State for additional trailer licenses, as follows: August 17th, one license; August 21st, two licenses; September 25th, three licenses; that it remitted the sum of Ten Dollars (\$10.00) as

a license fee for each such license; that the proper licenses were thereafter duly issued and received; that the trailers in question were purchased by claimant subsequent to July 1st, 1937, and were not put in use until after that date, and therefore the proper license fee, in accordance with Sections 8 and 9 of the Motor Vehicle Law was Five Dollars (\$5.00) for each trailer; and claimant therefore asks for a refund of the excess which it claims to have paid as aforesaid, to-wit, the total sum of Thirty Dollars (\$30.00).

The Attorney General has moved to dismiss the complaint on the ground that claimant is not entitled to a refund under the facts set forth in the complaint.

It is apparent from the facts set forth in the complaint that the license fees in question were paid voluntarily, without compulsion, and with a full knowledge of all the facts, and that the only mistake involved in the several transactions was a mistake of law, to-wit, a mistake as to amount of the license fee required to be paid under the provisions of the statute.

It has been repeatedly held that where an illegal or excessive tax or license fee is paid voluntarily with a full knowledge of all the facts, it cannot be recovered; also that where such license fee or tax is paid under a mistake of law, it cannot be recovered. *American Can Co. vs. Gill*, 364 Ill. 254; *Richardson vs. Kinney*, 337 Ill. 122; *Board of Education vs. Toennigs*, 287 Ill. 469; *Yates vs. Royal Ins. Co.*, 200 Ill. 202; *Butler Co. vs. State*, 9 C. C. R. 503; *Western Dairy Co. vs. State*, 9 C. C. R. 498; *Stollar-Herrin Lumber Co. vs. State*, 9 C. C. R. 517.

Under the fact set forth in the complaint, the claimant is not entitled to an award, and the motion of the Attorney General must therefore be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 5227--Claim denied.)

P. M. HURP, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 14, 1938.

M. D. MORANX, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

NEGLIGENCE - officers, agents and servants of State - State not liable for. State is not liable to respond in damages for the negligence of its officers, agents or servants, the doctrine of respondeat superior not being applicable to it.

PROPERTY DAMAGE - mule used and owned by claimant while in employ of State - possibility of loss or damage to, risk incident to employment. Where claimant was employed by State and in performance of his duties, used animal, driving of which he entrusted to another, and animal is injured, necessitating destroyal, as the result of the alleged negligence of employees of State, such loss is incidental to employment, State not being insurer of property of employees, and no award can be made for such loss.

MR. JUSTICE YANTIS delivered the opinion of the court :

From the complaint filed herein it appears that the State had employed plaintiff to cut weeds along the highway on Route No. 69 at a section about ten miles north of Ottawa, Illinois; that plaintiff was to receive therefor the sum of Six (\$6.00) Dollars per day for his services and the use of his team of mules and mowing machine. It further appears that on June 14, 1933, instead of plaintiff operating such mower he had one of his employees, named Dwain Hupp, mowing the grass and weeds. The complaint then recites that the State had negligently and carelessly permitted an old sharp rusty steel culvert to remain in the highway, and that because of its sharp jagged edges such culvert was dangerous to persons or livestock traveling along the side of the road; that plaintiff's employee did not know of the dangerous condition of the highway and was unable to see the culvert because of the high grass, and that he drove plaintiff's team of mules over and across the hole in the culvert and that one of the mules stepped into the hole thereby cutting its left hind-foot so badly that the mule had to be killed; for all of which claimant seeks an award of Two Hundred (\$200.00) Dollars.

The Attorney General has filed a motion to dismiss the complaint as failing to state a legal ground for an award, and contends that no award can be properly paid to claimant under the facts alleged.

Claimant was the one apparently hired by the State to do the work in question. He saw fit to employ someone to take his place, who was not familiar with the conditions along the roadway. He contends however that the accident to his mule was due solely to the negligence of the employees of the State in permitting the dangerous culvert to remain in the highway. As the State cannot be held to respond in dam-

ages for the negligence or torts of its servants and employees in the absence of a special statute, the motion of the Attorney General must be allowed. A similar case appears in the matter of *Gust Calsyn vs. State*, C. of C. No. 2678, wherein the court held:

"The right of redress by an injured employee is fixed by the terms of the Workmen's Compensation Act, but there is no rule of law by which the State can be held to insure the property of an employee that is being used by such employee while in the discharge of his duties. The probability of such loss or damage is a risk incident to the employment."

When the Legislature created the Court of Claims and clothed it with power to hear claims against the State, it did not intend to waive the right of the State to interpose legal or equitable defenses to such demands. Before a claimant can have an award against the State he must show that he comes within the provisions of some law making the State liable to him for the amount claimed. As the complaint fails to state facts upon which an award could be made, the Motion of the Attorney General is allowed and the claim dismissed.

(No. 3268—Claimant awarded \$10.50.)

A. W. ALLEN, M. D., Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 14, 1938.

Claimant, pro se.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

SERVICES—*lapse of appropriation out of which could be paid before payment—when award for may be made.* The facts in this case are similar to those in the claim of *Metropolitan Electrical Supply Company vs. State*, No. 3270, *supra*, and the opinion in that case is controlling herein.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

From the stipulation of facts herein it appears:

1. That on June 15th, 1937 one A. M. Porter, a State highway maintenance police officer, sustained accidental injuries which arose out of and in the course of his employment.

2. That upon authorization of his superior officer, the claimant rendered medical and surgical services to said A. M. Porter from June 15th, 1937 to July 9th, 1937.

3. That claimant submitted to the respondent two bills for the services rendered by him as aforesaid, one bill covering the period from June 15th, 1937 to June 23d, 1937, both dates inclusive, and the other bill covering the period from June 24th, 1937 to July 9th, 1937, both dates inclusive.

4. That the first bill was duly paid, and the second bill was returned to claimant with the suggestion that a bill be rendered for the period from June 24th, 1937 to June 30th, 1937, both inclusive, and a separate bill for the period from July 1st, 1937 to July 9th, 1937, both inclusive, as the same were required to be paid from different biennium appropriations, to-wit, the first from the 59th and the last from the 60th biennium appropriations.

5. By the time separate bills were rendered the 59th biennium appropriation had lapsed.

6. That the services were rendered by claimant as set forth in his statements, and that the charges therefor were the reasonable and customary charges for like services in that vicinity.

7. That claimant was paid for all of the services so rendered by him, except as to the services rendered between June 24th, 1937 and June 30th, 1937, both inclusive, for which there is due and owing to the claimant the sum of Ten Dollars and Fifty Cents (\$10.50).

We have repeatedly held that where services have been properly rendered to the State, and a bill therefor has been submitted within a reasonable time, but the same was not approved and vouchered for payment before the lapse of the appropriation from which it is payable, without any fault or neglect on the part of the claimant, an award for the reasonable and customary value of the services will be made, where at the time the expenses were incurred there were sufficient funds remaining unexpended in the appropriation to pay for the same. *Rock Island Sand & Gravel Co. vs. State*, 8 C. C. R. 165; *Indian Motorcycle Co. vs. State*, 9 C. C. R. 526; *Elgin, Joliet & Eastern Ry. vs. State*, No. 2164, decided at the January Term, 1938, of this court; *Goodyear Tire & Rubber Co. vs. State*, No. 3155, decided at the March Term, 1938, of this court.

The facts in this case bring it within the rule above set forth, and award is therefore entered in favor of the claimant for the sum of Ten Dollars and Fifty Cents (\$10.50).

(No. 3192—Claim denied.)

PHILIP ARRABITO, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 14, 1938.

ELLIOTT, GAUDAS & GILBERT, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

ILLINOIS LIQUOR CONTROL ACT—license issued under—claim for refund of unearned portion of fee for upon voluntary retirement from business for which issued before expiration of term thereof—when award for must be denied. The fact that claimant voluntarily retired from business for which license was issued under Act, before expiration of period for which such license was issued and paid for, does not authorize an award for refund of the unearned portion of such license fee, as the Act specifically enumerates the grounds upon which a refund can be had, and the voluntary retirement from such business is not one of the grounds so specified therein.

SAME—same—fee for, paid through misinformation of servant of State not involuntary payment—cannot be recovered. Where claimant pays a license fee, for a longer period than required and at a greater cost, due to misinformation given him by employee of the State as to the law pertaining to such license, such payment may be said to have been made under a mistake of law, but is not an involuntary payment and cannot be recovered.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant filed his complaint herein on January 25th, 1938, and alleges therein that on May 2d, 1936 he made application to the Illinois Liquor Control Commission, at the Chicago office of such commission, for a license to sell alcoholic beverages at retail; that the clerk in charge informed him that he would have to pay the sum of \$8.33 to cover the period from April 30th, 1936 to June 30th, 1936, and that in addition thereto he would have to pay the further sum of \$50.00 for the fiscal year commencing July 1st, 1936 and ending June 30th, 1937; that thereupon he paid the total sum of \$58.33 as requested, and received a receipt therefor; that he continued to operate his business under such license until about June 1st, 1936, when he sold the business and retired therefrom; that he received his formal license on June 6th, 1936, after he had ceased to operate the business, said license being for the fiscal year commencing July 1st, 1936; that thereafter he made a demand upon the Liquor Control Commission at its Chicago office, for a refund of the license fee for the fiscal

year commencing July 1st, 1936; that he was "unnecessarily caused to prepay" the license for such fiscal year, and that had he known that he could then have obtained a license for the period from April 30th, 1936 to June 30th, 1936, he would have paid only for that period.

The Attorney General has entered a motion to dismiss the complaint and the case comes before the court on such motion.

The only cases in which a refund of the license fee is authorized under the terms and provisions of the Illinois Liquor Control Act (Ill. Rev. Stat. 1937, Bar Assn. Ed., Chap. 43) are the following, to wit:

(1) Where the application is denied (Art. 7, Sec. 2).

(2) In case of the death, insolvency or bankruptcy of the licensee, where the unexpired term exceeds the allowable operating period provided for under the statute (Art. 6, Sec. 1).

(3) Where the political subdivision, district, precinct or group of precincts in which the licensed premises are situated becomes prohibition territory during the term of the license (Art. 9, Sec. 16).

The legislature having provided for a refund in certain cases, we have no authority to allow a refund in any other cases. It is a rule of general application that a licensee upon the surrender of his license is not entitled to a rebate or a refund of the whole or any part of the fee paid by him, in the absence of a statute expressly authorizing such rebate or refund. 33 C. J. 572, sec. 180; 37 C. J. 255, sec. 130; 15 R. C. L. 315, sec. 76.

It is also a well settled rule in this State that where an illegal or excessive license fee or tax is paid voluntarily and with a full knowledge of the facts, it cannot be recovered; also that where such license fee or tax is paid under a mistake of law, it cannot be recovered. *Richardson vs. Kinney*, 337 Ill. 122; *Board of Education vs. Toennigs*, 287 Ill. 469; *Yates vs. Royal Ins. Co.*, 200 Ill. 202; *Butler vs. State*, 9 C. C. R. 503; *Western Dairy Co. vs. State*, 9 C. C. R. 498; *Stollar-Herrin Lumber Co. vs. State*, 9 C. C. R. 517.

The claimant contends that the payment in this case was involuntary, for the reason that he was advised by the clerk in charge of the office that he was required to make application for the total period of fourteen months, whereas he might have made application for two months only.

Assuming that he was misinformed by the clerk as to the law in the matter, yet that does not make the payment involuntary. The terms "voluntary" and "involuntary", when used with reference to payments of taxes, are not applied in their ordinary sense. Note, 64 A. L. R. 11. In *Yates vs. Royal Ins. Co.*, *supra*, the court quoted with approval from *Cooley on Taxation*, 2d Edition, 810, as follows:

"All payments are supposed to be voluntary until the contrary is made to appear. Nor is the mere fact that a tax is paid unwillingly, or with complaint of any legal importance, but there must in the case some degree of compulsion, to which the taxpayer submits at the time but with notification of some sort equivalent to reservation of rights."

Claimant, as well as the clerk, was charged with knowledge of the law, and the most that can be said on claimant's behalf, is that the payment was made under a mistake of law. That, however, does not give him the right to an award under the authorities above cited.

The question here involved has been presented to this court in several different cases, and we have uniformly held that the claimant was not entitled to recover. *Block vs. State*, 9 C. C. R. 453; *Beals vs. State*, 9 C. C. R. 456; *Yott vs. State*, No. 3035, decided at the September Term, 1937, of this court; *Ulie & Moreno vs. State*, No. 3101, decided at the September Term, 1937, of this court; *Pudenz vs. State*, No. 3015, decided at the May Term, 1937, of this court.

The only difference between the cases above cited, and the present case, on the facts, is the statement made by the claimant in the present case that he was required by the clerk to make payment for the full period of fourteen months. As hereinabove set forth, such statement does not make the payment involuntary, and does not distinguish this case on the law from the cases above cited.

On the law and the facts we have no authority to allow an award.

Award will therefore be denied and the case dismissed.

(No. 3196—Claimant awarded \$195.00.)

THOMAS F. SHORTELL, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 14, 1938.

Claimant, pro se.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

SERVICES RENDERED: when award may be made for. Where it appears that claimant rendered services at the request of State officer, which were accepted by the State and which the State was legally obligated to pay for, and that bill therefor was not presented for payment before lapse of appropriation out of which it could be paid, an award for the amount found due may be made, on claim filed within a reasonable time.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant is a physician and surgeon engaged in the practice of his profession in the City of Chicago, Illinois. John Conlin was an Illinois State Highway Maintenance Policeman, who, on March 24, 1935, was driving a motorcycle owned by the State of Illinois during the course of his employment, and while going westward on Jackson Blvd., was struck by a car and suffered various injuries, necessitating his becoming a patient at the Cook County Hospital. Plaintiff treated the injured employee on April 1, 1935 and continued giving him professional care until July 15th. Conlin had suffered serious cuts across the right eye, nose and forehead, making it impossible for him to close the eye. Medical treatments were administered for the purpose of making it possible to more nearly close the eye, during his sleeping moments. The care given Conlin was authorized by Lieutenant Frank Jarzembowski, his superior in the department. A report made by Engineer of Claims, M. K. Lingle, states that the injury received by Conlin was brought to a permanent stage about July 15, 1935 by the treatments administered by Dr. Shortell. At the conclusion of claimant's services a bill was submitted to Walter Williams, Superintendent of the Illinois State Highway Maintenance Police, and the latter was of the opinion that the services were essential and that the fees were reasonable and customary, but as he believed that the third party who had injured Conlin was responsible for the medical care, he did not submit the bill of the claimant for payment. Meanwhile, the appropriation from which the bill could have been paid lapsed, and the bill has never been paid. At the time such appropriation lapsed there remained therein sufficient unexpended balances to pay for the services rendered.

The record discloses that the employee John Conlin and the State of Illinois were governed at the time of the accident in question and of the rendering of the medical care, by the Workmen's Compensation Act of Illinois.

Under Sub-section (a), Section 8 of the Act the employer in such case is obligated to furnish the medical services necessitated by an injury sustained by the employee which arises out of and in the course of the employment.

"Where claimant has rendered services or furnished supplies to the State on the order or request of an official authorized to contract for the same, and submits a bill therefor within a reasonable time, and due to no negligence or fault on the part of claimant same is not approved and vouchered for payment before the appropriation from which it is payable lapses, an award for the reasonable and customary value of the services or supplies will be made where, at the time the obligation was incurred, there were sufficient funds remaining unexpended in the appropriation to pay for the same."

Rock Island Sand & Gravel Co. vs. State, 8 C. C. R. 165.

An award is therefore hereby made in favor of claimant in the sum of One Hundred Ninety-five (\$195.00) Dollars.

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(Nos. 2703-2704-2705, Consolidated—Claimants awarded \$4,800.00.)

JOSEPHINE TYRRELL, BERNARD TYRRELL AND WILBUR P. TYRRELL, JR.,
Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 11, 1938.

FRANK J. TYRRELL and PAUL J. DONOVAN, for claimants.

OTTO KERNER, Attorney General; GLENN A. TREVOR and MURRAY F. MILNE, Assistant Attorneys General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award for compensation under same be made.* Where employee sustains accidental injuries, resulting in his death, arising out of and in the course of his employment, while engaged in extra hazardous employment, an award for compensation for such injuries may be made, to those entitled thereto, in accordance with the provisions of the Act, upon claim made and application filed for same within time required therein.

Mr. Justice YANTIS delivered the opinion of the court:

Wilbur P. Tyrrell was employed by the Department of Public Welfare, at the St. Charles School for Boys. He was an electrical engineer under the classified Civil Service of the State of Illinois. He was first assigned to Chester in April, 1934 and was later transferred to the St. Charles School for Boys. His duties were to install, operate and repair electric light, power and telephone equipment and electrical work in connection with the maintenance and upkeep of State buildings. On July 18, 1934 while attempting to repair an elec-

trically driven grist mill in a barn or storehouse on the premises of the St. Charles School for Boys, he was killed.

Separate claims were originally filed by Josephine Tyrrell, his widow, and by each of his two minor children, Bernard Tyrrell and Wilbur P. Tyrrell, Jr.

A motion to dismiss was filed by respondent for each of said claims, and thereafter an amended complaint was filed and a joint motion to consolidate the three cases was allowed.

The evidence discloses that claimant Josephine Tyrrell and the deceased were married June 1, 1917. On the day of the accident and death of Wilbur P. Tyrrell, July 18, 1934, their son Wilbur was fifteen years of age and their son Bernard was of the age of twenty-one months. All three were living with deceased at the time of his death and were dependent upon him for support. The widow had not remarried at the time the testimony in this case was taken, on July 14, 1938.

The motor which operated the grist mill was an unusually large one. It was mounted on a large plank platform. The shaft from the motor ran in an easterly and westerly direction, and to this was fastened a large pulley and from it a belt which ran to the grist mill in the far end of the building. The motor had been giving some trouble and it had been the custom of the boys at the School to start it with a crowbar. The deceased was apparently working on the motor and while it was running the pulley broke and the spokes flew from same, one or more of them striking the deceased. When other employees reached him he was lying on the floor in a pool of blood with particles of brain tissue showing on one of the spokes. Parts of the wheel went through the roof, and upon examination of same there had apparently been a crystallization or a defect in same.

John F. Tyrrell, a brother of decedent, communicated with Robert F. Havlik, Superintendent of St. Charles School for Boys, on the day of the Coroner's inquest, stating that he represented Mrs. Tyrrell and the children in regard to their claim for compensation, and was informed that the matter would be communicated to the Department of Public Welfare. On the 19th day of July, 1934, a written request was made by him on behalf of the widow and children to Superintendent Havlik for compensation under the Workmen's Compensation Act. On July 26, 1934 a copy of the Rules of the Court

of Claims was sent to Josephine Tyrrell with a letter from the Department of Public Welfare over the signature of Malden Jones, Personnel Officer, suggesting the proper procedure for her in furthering her claim for an award under the Act. Claimant's annual wages during the year preceding his death were One Thousand Eight Hundred Seventy-two (\$1,872.00) Dollars, being at the rate of Seven and 20/100 (\$7.20) Dollars per day on the basis of five days of work per week, or an average of Thirty-six (\$36.00) Dollars per week. The court finds from the record:

1. That the deceased Wilbur P. Tyrrell and respondent were, at the time of the accident and death of the former, both operating within the terms of the Workmen's Compensation Act.

2. That the injury and death of Wilbur P. Tyrrell was caused by an accident which arose out of and in the course of his employment by the State of Illinois.

3. That respondent had actual notice of the accident and that notice of claim, and application for compensation were made within the statutory limits prescribed by said Act.

4. The deceased's annual earnings for the year preceding his death in the employment in which he was then engaged were One Thousand Eight Hundred Seventy-two (\$1,872.00) Dollars, or an average weekly wage of Thirty-six (\$36.00) Dollars.

5. That he left surviving him as his widow, Josephine Tyrrell, and his two sons, Bernard Tyrrell and Wilbur P. Tyrrell, Jr., both of the latter being under the age of sixteen years on the date of said accident, each of said persons being equally dependent upon the deceased for his or her support.

6. That under the terms of the Illinois Workmen's Compensation Act in force on July 18, 1934, Paragraphs (a), (g) and (h), Section 7, the amount of compensation due under the foregoing facts would be four times the average annual earnings, but not greater than Four Thousand (\$4,000.00) Dollars plus Eight Hundred (\$800.00) Dollars because of said two children, making a total of Four Thousand Eight Hundred (\$4,800.00) Dollars. That such compensation should, in the opinion of the court be payable to the said surviving widow Josephine Tyrrell for the benefit of herself and the said two minor children.

7. That said award is payable in weekly installments

of Sixteen (\$16.00) Dollars per week by reason of the increase from the usual maximum of Fifteen (\$15.00) Dollars to Sixteen (\$16.00) Dollars, by reason of the existence of two children under the age of sixteen years at the time of the injury.

8. That two hundred twenty-two (222) weeks of compensation will have accrued to October 11, 1938 which amounts to Three Thousand Five Hundred Fifty-two (\$3,552.00) Dollars, which is payable at this time and the balance of said compensation, i. e. One Thousand Two Hundred Forty-eight (\$1,248.00) Dollars is payable in seventy-eight (78) weekly installments of Sixteen (\$16.00) Dollars per week, commencing October 18, 1938.

An award is therefore hereby entered, in the sum of Four Thousand Eight Hundred (\$4,800.00) Dollars, payable to Josephine Tyrrell for the use of herself and Bernard Tyrrell and Wilbur P. Tyrrell, Jr.; the sum of Three Thousand Five Hundred Fifty-two (\$3,552.00) Dollars being payable immediately; and the sum of One Thousand Two Hundred Forty-eight (\$1,248.00) Dollars being payable at the rate of Sixteen (\$16.00) Dollars per week in seventy-eight (78) weekly installments, commencing October 18, 1938.

This award being subject to the provisions of an Act entitled, "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," approved July 3, 1937 (Sess. Laws 1937 p. 83), and being, by the terms of such Act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from said appropriation from the General Revenue Fund in the manner provided for in such Act.

(No. 3249—Claim denied.)

RAY CAIRNS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 11, 1938.

BAKER, NIVEN & CRABTREE, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

NEGLIGENCE—*respondent superior—doctrine of, not applicable to State.* In the exercise of governmental functions, the State is not liable for the negli-

gence of its officers, agents or employees, in the absence of a statute making it so, and in this State there is no such statute.

PENAL INSTITUTIONS—conduct and maintenance of, governmental function—state not liable for negligence of employees of. The conduct and maintenance of the Illinois State Penitentiary, is a purely governmental function, and the State is not liable to respond on damages, for personal injuries, or damages to property, occasioned by the negligence or wrongful conduct of the officers, agents, employees or inmates thereof.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On December 26th, 1937 claimant was driving his Chevrolet truck in a westerly direction on S. B. I. Route No. 116 in Livingston County; said truck being loaded with thirty two ten-gallon milk cans filled with milk.

At the same time, one Ralph Jones, an employee of the respondent at the Illinois State Penitentiary at Pontiac, Illinois, was driving a certain Buick sedan owned by the respondent, in a westerly direction on said highway, and was approaching the truck driven by the claimant.

The complaint alleges that when the car of the respondent was several hundred feet behind his truck, he signaled that he was going to turn to the left and immediately slackened the speed of such truck, and turned the same to the left; that said employee of the respondent then and there drove said Buick sedan in such a careless and negligent manner that it was caused to and did run into claimant's truck, whereby said truck was turned over and damaged, the milk spilled, five of the milk cans were damaged and rendered worthless, and claimant was deprived of the use of said truck for the period of four weeks while the same was being repaired;—for all of which he seeks an award in this proceeding.

The Attorney General has moved to dismiss the case on the ground that the State is not liable for the acts of its servants and agents under the doctrine of respondent superior.

In the maintenance of its penal institutions, the State is acting in a governmental capacity, and it is well settled in this State that the State, in the exercise of its governmental functions, is not liable under the doctrine of respondent superior, for the careless, negligent or wrongful acts of its servants or agents, in the absence of a statute making it so liable. *Hollenbeck, Adm., vs. Winnebago County*, 95 Ill. 148;

Mearns vs. State Board of Agriculture, 259 Ill. 549; *Tollefson vs. City of Ottawa*, 228 Ill. 134; *Kinnare vs. City of Chicago*, 171 Ill. 332; *City of Chicago vs. Williams*, 182 Ill. 135; *Giehardts vs. Village of LaGrange Park*, 354 Ill. 234; 25 R. C. L. p. 407, sec. 43; 13 R. C. L. p. 944, sec. 8; 8 R. C. L. Supp. p. 5580, sec. 43; see also *Parks vs. State*, 8 C. C. R. 535; *Myers vs. State*, 9 C. C. R. 470, and cases there cited.

The liability, if any, rests upon the negligent employee, and not upon the State.

Under the facts set forth in the complaint, we have no authority to allow an award, and the motion of the Attorney General must therefore be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 3294—Claimant awarded \$135.00.)

MELLISSA LACEFIELD, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 11, 1938.

Claimant, pro se.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

SOLDIERS' BONUS—death of soldier between application for and issuance of warrant—when award to one entitled may be made. Where claim for soldiers' bonus was filed and approved, and warrant issued for same, but soldier died before receiving it, and same is returned and cancelled and no one has received the compensation awarded soldier, an award may be made for amount thereof, to one lawfully entitled thereto.

SAME—claim for—when Statute of Limitations begins to run against. The proper construction of the wording of the 1927 Bonus Act is that the Statute of Limitations in claims for soldiers' bonus, by heir of deceased soldier, does not begin to run until satisfactory proof of heirship is furnished Adjutant General.

SAME—Court of Claims Act—1927 Bonus Act—when latter prevails. The 1927 Bonus Act was passed later than the Court of Claims Act, and if there is any conflict in regard to time, within which claims for soldiers' bonus should be filed, the later Act should prevail.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant filed her claim Pro Se on July 5, 1938 as the mother of Herbert M. Lacefield, and thereby seeks payment of a soldier's bonus to which the latter was entitled as a soldier from the State of Illinois in the World War. The At-

torney General has filed a motion to dismiss the claim, contending that the court has no jurisdiction for the reason that the complaint shows upon its face that more than five years have elapsed between the time claimant's right first accrued and the date of filing such complaint. A report filed herein by the Adjutant General of Illinois discloses that Herbert M. Lacefield applied for an Illinois soldier's bonus on February 19, 1923; that the application was approved and Warrant No. 355,800 was issued to him in the sum of One Hundred Thirty-five (\$135.00) Dollars. Between the time the application was filed and the time the Warrant was issued, i. e. on June 9, 1923, Herbert M. Lacefield died, leaving a widow but no children. His widow remarried in September, 1923. Payment on the Warrant was stopped and same was returned to the State Treasurer and was cancelled. Claimant herein as the mother of the deceased soldier, represents herself as the beneficiary entitled to receive the bonus that is payable by virtue of her son's military service.

Section 2, House Bill No. 127 (the original bonus Act, approved May 3, 1921) states the beneficiaries of such act to be "the husband or wife (if not remarried), child or children, mother, father, brother or sister in the order named."

The Adjutant General's report states that the mother appears to be the proper beneficiary.

In 1927 the legislature passed another Act entitled, "An Act Terminating the Service Recognition Board and Making Provision for Certain Claims for Compensation." Section 3 of the 1927 Act is as follows:

"In all cases where claims for compensation have been heretofore or are hereafter allowed by the service recognition board but payment of compensation has not been made either because the claimant or his heirs have not been found, or any other reason, it is the duty of the Adjutant General, as soon as satisfactory proof is furnished to him, locating or identifying the claimant or his heirs or as soon as the disability preventing payment is removed, to certify such fact to the State Treasurer, who shall make payment from the soldier's compensation fund, in the sum allowed by the service recognition board to the person entitled thereto."

The 1927 Act of the Legislature seems broad enough to avoid the limitation of one year fixed by the 1925 statute which required applications to be made within one year from the date that such Act became effective, which was July 1, 1925.

Cases similar to the present one have previously been considered by the court. (*Orilla Lorraine Thomas vs. State*, 8 C. C. R. 211. *Catherine Knarr vs. State*, 8 C. C. R. 565.) This case like the others thus considered is a meritorious one, and unless barred by the statute of limitation, should be paid. We have heretofore construed the wording of the 1927 Act to mean that the statute of limitations would not begin to run until "satisfactory proof of heirship or dependency" is furnished to the Adjutant General. The 1927 Bonus Act was passed later than the Court of Claims Act, and if there is any conflict in regard to the right of claimant in point of time to file her claim, the later Act should prevail. Such Act carried an appropriation for the payment of claims arising by virtue thereof. Such appropriation, made in the 1927 Act lapsed in 1929. House Bill No. 474, approved June 14, 1929, appropriated the balance of this fund (\$101,804.00) to the Department of Public Welfare for the relief of indigent women and children of deceased World War veterans. The Adjutant General's office has certified that satisfactory proof has been furnished to him identifying claimant as the one to whom compensation is payable, but there is no existing appropriation out of which such bonus payment can be made. We find that claimant is properly entitled to receive such compensation as was contemplated in the passage of the Act by the legislature, and an award is therefore hereby allowed in favor of claimant in the sum of One Hundred Thirty-five (\$135.00) Dollars.

(No. 8274—Claim denied.)

FLORENCE NICHOLS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 11, 1938.

THEODORE W. HINDS, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

NEGLIGENCE—employees of State Charitable Institution—State not liable for. An award for damages, based on the alleged negligence of employees of State Charitable Institution, in performing surgical operation on employee of State and in post operative treatment, is not justified under any theory of law or equity, as the doctrine of respondeat superior is not applicable to the State, and it is not liable for the negligent and wrongful acts or conduct of its officers, agents or employees.

MR. JUSTICE YANTIS delivered the opinion of the court:

The complaint herein discloses that plaintiff was employed as an attendant at the Elgin State Hospital being employed under the Department of Public Welfare; that she had been assigned duties therein which were detrimental to her health and well being though not so known to her at that time, and that although she was a strong and robust person such work was injurious to her health, and as an approximate result of such work she submitted to an operation at the Elgin State Hospital on or about December 2, 1936. The claim further recites that she was informed by the physician in charge that the operation would be for the removal of her appendix, or, if necessary, an exploratory operation; that she signed a blank unfilled operation permit form, but that without her further knowledge or consent the physician in charge caused the removal of claimant's ovaries, fallopian tubes and uterus; that following such operation injections of glucose were given to her in her limbs in such a negligent manner that the latter became infected; that she was thereafter so negligently cared for the infection resulted in large and unsightly scars, weakening of the muscles of her thighs which left claimant unable to work in as competent a manner as heretofore, and prevents and deprives her of the opportunity of having a family which she was desirous of doing, for all of which she prays damages from the State of Illinois in the sum of Twenty-two Thousand Seven Hundred Thirty-five and 20/100 (\$22,735.20) Dollars.

The Attorney General has filed a motion to dismiss the complaint, for the reason that same seeks an award for the alleged negligent conduct upon the part of officers, agents and employees of the State, for which the latter cannot be held to respond.

"The doctrine of *respondent superior* does not apply to the State, and the latter, in the absence of a statute, is not liable to respond in damages for injuries occasioned by the negligent and wrongful conduct of its officers, agents or employees."

Jones vs. State, 8 C. C. R. 78.

Palumbo vs. State, 8 C. C. R. 196.

Short vs. State, 9 C. C. R. 134.

The doctrine of the State's liability is rather fully set forth in the case of *Crabtree vs. State*, 7 C. C. R. 207, where the court holds:

"The jurisdiction of the Court of Claims to make an award is limited to cases where the State would be liable in law or equity in a court of general jurisdiction if it were suable."

The motion of the Attorney General is allowed and the claim dismissed.

(No. 3304—Claimant awarded \$234.27.)

R. H. DAVIDSMEYER, DOING BUSINESS AS ILLINOIS ROAD BUILDERS,
Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 11, 1938.

VAUGHT, FOREMAN & CLEARY, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR,
Assistant Attorney General, for respondent.

SUPPLIES—lapse of appropriation out of which could be paid—before payment—when award for may be made. Where facts are undisputed that State received merchandise, as ordered quality, quantity and prices thereof being in accordance with order, and that bill therefor, through no negligence of claimant was not presented before lapse of appropriation out of which it could be paid, and that at time of lapse there was sufficient funds therein to pay same, an award for the price of same may be made on claim filed within a reasonable time.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On July 1st, 1936; October 15th, 1936; and October 23d, 1936, claimant delivered to the respondent certain road oil for use on a detour on S. B. I. Route No. 104 near Franklin, Illinois, pursuant to a previous purchase order issued by the Division of Purchases and Supplies, Department of Finance, of the respondent.

It is admitted that the merchandise was delivered as ordered, and that the quality, quantities and prices were in accordance with the purchase order. Through an error on the part of a representative of the Division of Highways, the quantities shown in the complaint were not scheduled in time for payment from the 59th biennium appropriation, and it therefore became necessary for the claimant to file his claim in this court.

We have repeatedly held that where materials or supplies have been properly furnished to the State, and a bill therefor has been submitted within a reasonable time, but the same

was not approved and vouchered for payment before the lapse of the appropriation from which it is payable, without any fault or neglect on the part of the claimant, an award for the reasonable value of such materials or supplies will be made, where, at the time of the purchase thereof, there were sufficient funds remaining unexpended in the appropriation to pay for the same. *Metropolitan Electrical Supply Co. vs. State*, No. 3270, decided at the present term of this court, and cases there cited.

The facts in this case bring it within the rule above set forth, and therefore claimant is entitled to an award for the amount due it in accordance with the aforementioned purchase order, to wit, \$234.27.

Award is therefore entered in favor of the claimant for the sum of Two Hundred Thirty-four Dollars and Twenty-seven Cents (\$234.27).

(No. 3251—Claim denied.)

W. A. WILKINSON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 11, 1938.

Claimant, pro se.

OTTO KERNER, Attorney General; MURRAY P. MILNE, Assistant Attorney General, for respondent.

MOTOR VEHICLE LICENSE FEE—claim for refund—when use of vehicle discontinued during part of year for which issued—no provision in statute for —must be denied. The facts in this case are almost identical with those in *Freeport Floral Company, etc. vs. State*, 9 Court of Claims Reports, page 149, and the opinion in that case is decisive herein.

MR. JUSTICE YANTIS delivered the opinion of the court:

On December 17, 1937 plaintiff herein, according to his complaint, purchased a license for an automobile then owned by him, and paid to the Secretary of State a license fee in the sum of \$10.50. He received the license plates, but on the 1st day of January the automobile for which same were purchased was wrecked and was disposed of as junk, and claimant now seeks a refund of the amount so paid by him for the said license plates.

The Attorney General has filed a motion to dismiss on the ground that the complaint does not set out a claim which the

State of Illinois as a sovereign commonwealth should discharge and pay.

Applications of a similar nature have been frequently before the Court, and in all instances where proper objection has been interposed, the Court has held that no refund is properly allowable. There is no provision of the Motor Vehicle Act or by any other law which authorizes a return of a license fee under the facts set forth in the complaint. If the legislature intended that refunds should be made under any set of circumstances they could have placed such provision in the statutes. Under the facts stated in the complaint plaintiff could not maintain an action against the State if the latter were suable in a court of law. The motion of the Attorney General is therefore sustained and the complaint dismissed.

(No. 3258—Claim denied.)

MABEL B. SALE, AS ADMINISTRATRIX OF THE ESTATE OF LLOYD B. SALE,
DECEASED, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 11, 1938.

GLENN, REAL & BROWNING, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE,
Assistant Attorney General, for respondent.

NEGLIGENCE—*respondent superior*—doctrine of not applicable to State. In the exercise of governmental functions, the State is not liable for the negligence of its officers, agents or employees, in the absence of a statute making it so liable, and in this State there is no such statute.

HIGHWAYS—*construction and maintenance of governmental function.* In the construction and maintenance of public highways, the State exercises a governmental function, and is not liable for damages, caused by a defect in construction or failure to maintain same in safe condition for travel, or the negligence or wrongful conduct of its officers, agents or employees in connection therewith.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Mabel B. Sale, as administratrix of the estate of Lloyd B. Sale, deceased, filed her complaint herein on May 7th, 1938, and alleges therein in substance:—

That on September 22d, 1937 claimant's intestate was driving his automobile in a southerly direction on McCormick

Bld., in the Village of Niles Center in Cook County, Illinois; that at the same time the respondent, by one of its servants and agents, was driving its auto truck in a southerly direction on Main Street in said village, and was approaching the intersection thereof with McCormick Blvd.; that both of said streets are paved streets, and that they intersect at right angles in a suburban district of said village; that while claimant's intestate was driving across such intersection, in the exercise of all due care and caution, the respondent, through its said agent, so carelessly and negligently drove and operated its said truck into and across such intersection, that it ran into and collided with the automobile of claimant's intestate with great force and violence, and thereby inflicted injuries upon claimant's intestate from which he died on the same day; that said decedent left him surviving Mabel B. Sale, his widow, and William Lloyd Sale and Laura Muriel Sale Gregory, his children, as his next of kin; that by reason of the death of claimant's intestate, said next of kin have been deprived of their means of support; that claimant was duly appointed administratrix of the estate of said decedent by the Probate Court of Cook County, and asks for an award in the amount of \$10,000.00.

The second count of the complaint is similar to the first, except that it alleges that the death of claimant's intestate was the result of the wilful and wanton acts and conduct of the respondent through its said agent.

The Attorney General has moved to dismiss the case upon the grounds that the State is not liable for the acts of its servants and agents under the doctrine of respondeat superior.

The complaint alleges that the truck of the respondent was loaded with concrete beams, concrete beam boxes, and other road-building materials, and that the driver thereof was acting within the scope of his employment. The legitimate inference to be drawn therefrom is that the employment of claimant's intestate was in connection with the construction or maintenance of the concrete highways of the respondent.

We have repeatedly held that the State in the construction and maintenance of its hard-surfaced highways is engaged in a governmental function, and that in the exercise of such functions, it is not liable for the carelessness and negligence of its servants and agents, in the absence of a statute making it so liable. *McGready, et al. vs. State*, 9 C. C. R. 63;

Boyd vs. State, 9 C. C. R. 67; *Tirnan vs. State*, 9 C. C. R. 495; *York vs. State*, 9 C. C. R. 472; *Crank vs. State*, 9 C. C. R. 379; *Spurcell vs. State*, No. 2228, decided September Term, 1937; *Walt vs. State*, No. 3215, decided May Term, 1938.

The liability, if any, rests upon the negligent servant or agent, and not upon the State.

The question raised by the second count of claimant's complaint was squarely before this court in the case of *Garbutt vs. State*, No. 2246, in which an opinion on rehearing was filed at the September Term, 1937. In that case we held that if the State is not liable for the ordinary negligence of its servants and agents, there is no principle of law under which it can be held liable for the gross negligence or the wanton acts of such servants and agents, in the absence of a statute making it so liable.

The rule announced in the Garbutt case was followed in the case of *Stanley vs. State*, No. 2697, decided November Term, 1937; and the case of *Durkiewicz vs. State*, decided September Term, 1937.

Under the law as above set forth, we have no authority to allow an award, and therefore the motion of the Attorney General must be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 3092—Claim denied.)

ROY DE VINCENT COX, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 13, 1938.

Claimant, pro se.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

COURT REPORTER—term of office—death of judge appointing terminates. Where court reporter is appointed by judge of Circuit Court, during the pleasure of the judge so appointing him, in accordance with the statutes providing for appointment of court reporters, the death of the judge so appointing such court reporter terminates his term of office.

SALARY—court reporter—earned after death of judge appointing—when no award can be made for. No award can be made for salary to court reporter appointed by judge of the Circuit Court under authority of statute, for services rendered after death of judge appointing him, as the death of said judge terminated his office and the termination of the office of the judge also terminated the tenure of his court reporter. *Shell vs. State of Illinois*, 8 Court of Claims Reports, page 235 overruled.

Per curiam:

From the stipulation of facts herein it appears:

1. That on August 16th, 1933 claimant was duly appointed court reporter by Hon. Max F. Allaben, then one of the Circuit Judges for the Sixteenth Judicial Circuit, comprising the counties of Kane, DuPage, Kendall and DeKalb.
2. That on August 10th, 1936 said Max F. Allaben died, and from that date until the present time the judicial work of the Sixteenth Judicial Circuit has been handled and carried on by the two surviving judges, to wit, Hon. William J. Fulton of Sycamore and Hon. Frank W. Shepherd of Elgin.
3. That claimant received the compensation to which he was entitled for his services as court reporter from the date of his appointment up to and including the month of August, 1936, but has not received any compensation as such court reporter since the month of August, 1936.
4. That after the death of said Judge Allaben claimant was requested by the two surviving judges of that Judicial Circuit to continue his work as court reporter, and pursuant to such request, has continued to perform the regular duties of court reporter in connection with judicial proceedings in the Circuit Court of DuPage County, and was still continuing to perform such work at the time of the filing of the complaint herein.
5. That the regular salary and compensation of court reporters under the laws of this State is \$270.00 per month, and that the original claim filed by the claimant herein is to be considered as having been amended to cover the period which has accrued since the claim was originally filed and during which claimant has continued to act as such court reporter.
6. That the docket of the Circuit Court of DuPage County is a very heavy one and requires the attendance of at least one judge for practically every court day in the term, and the attendance of two judges on Friday of each week; that claimant has attended each and every session of the Circuit Court of DuPage County during all the time covered by this claim, and holds no other appointment as court reporter in any other court of this State.
7. That the official court reporter for Hon. Wm. J. Fulton is D. V. Scheffner, and the official court reporter for Hon. F. W. Shepherd is Jennie E. Little; that said D. V.

Scheffner, during the entire period of time covered by this claim has also acted as official court reporter for the County Judge of Kane County, and the Probate Judge of Kane County; that Jennie E. Little during said period has also acted as official court reporter for the County Judge of DeKalb County; that the County Court of DeKalb County is also a court of probate jurisdiction; that by reason of their duties as court reporters as above set forth, neither said D. V. Scheffner nor said Jennie E. Little has attended the Circuit Court of DuPage County when in session, as court reporter for either of the surviving judges of said 16th Judicial Circuit.

8. That it is and has been essential to the conduct of the judicial business of the Circuit Court of DuPage County, in the usual and ordinary manner, that a court reporter be in attendance at the sessions of said court, and that without the services of such reporter it was and is impossible to carry on the business of said court.

9. That claimant has during all of the time covered by his claim performed the work of court reporter at the sessions of the Circuit Court of DuPage County in a competent, dependable and skillful manner.

Respondent has filed a motion to dismiss the case for the reason that claimant's office as court reporter terminated with the death of Judge Allaben, and for the further reason that the claimant has a complete and adequate remedy, enforceable in the ordinary courts of general jurisdiction.

In 1927 the Legislature of this State enacted a law entitled "An Act to Authorize the Judges of Circuit, Superior and City Courts to Appoint Shorthand Reporters for the Taking and Preservation of Evidence, and to Provide for their compensation." (Ill. Rev. Stat. 1937, State Bar Assn. Ed., Chap. 37, Secs. 163a, b, c, and d.) Section 163a of such Act provides as follows:

"That each of the several judges of the Circuit, Superior and City courts in this State, be and they are hereby authorized to appoint one official shorthand reporter, who shall be skilled in verbatim reporting, and who shall have been a bona fide resident of the State of Illinois for one year, and whose duty shall be as hereinafter specified. None of said reporters shall hold more than one of said official appointments. Such appointment shall be in writing and shall be filed in the office of the Auditor of Public Accounts, and continue in force until revoked by the Judge making said appointment. The reporter so appointed shall hold his position during the pleasure of the

judge so appointing him, not, however, to extend beyond the time the judge making such appointment shall be elected for; *provided, however*, that in case of the absence or disability of said reporter so appointed, the Presiding Judge may appoint any other competent reporter to act in his place during such absence or disability, which said substitute shall be paid by said official reporter for his said services."

Prior to 1934, the construction of such statutory provisions, as applied to facts similar to those involved in this case, had never come before our Supreme Court.

In the case of *Shell vs. State*, 8 C. C. R. 235 (decided November 13, 1934), upon the authority of *The People Ex Rel, etc. vs. Kelley*, 134 Ill. App. 642, we held that a court reporter's term of office did not expire upon the death of the judge appointing him, and that such reporter continued in his office until the time of the appointment of another court reporter by the successor to the deceased judge.

Since the filing of such decision, the question as to the proper construction of the aforementioned statutory provisions has come before our Supreme Court in the case of *People vs. Barrett*, 365 Ill. 73. In that case plaintiff had been appointed court reporter by Judge Craig Van Meter, formerly a Judge of the Circuit Court of the Fifth Circuit. Judge Van Meter presented his resignation to the Governor in December, 1935, and same was duly accepted. On January 1st, 1936 Judge Van Meter ceased to act as Circuit Judge. Although the plaintiff performed no duties as court reporter since January 1st, 1936, she held herself ready to do so, but was refused a salary warrant by the State Auditor on the ground that the resignation of Judge Van Meter terminated her right to hold the office of court reporter. Thereupon she instituted a mandamus proceeding against the State Auditor to compel the issuance of a warrant for the amount which she claimed to be due her.

The case was quite exhaustively considered by the court, and it was there held that the resignation of Judge Van Meter and the acceptance of such resignation by the Governor, terminated his office, and that the termination of the office of the Judge also terminated the tenure of his court reporter. In its consideration of the case, the court said:

"The statute cannot be construed without noticing that each and every judge of the Circuit and Superior courts has his personal court reporter. It should be held that when a judge resigns his court reporter continues in office, it would be with nothing to do except to draw the salary, because any

other judge called in to do the work of the court would have his own duly appointed court reporter to work for him and with him and he might not wish to work with some other reporter. * * * We take it that the Act means that the appointment is absolutely under the control of the judge making it, and that in order to hold the office a court reporter must be sustained by the continuing will and pleasure of "the judge so appointing him." Without the continuance of that will and pleasure the office necessarily fails. There can be no court reporter for a judge if there is no judge to require such a reporter."

There is no distinction in principle between the present case and the Barrett case, and we are bound by the law as there laid down.

Under the law as declared by our Supreme Court, the court reporters originally appointed by the surviving judges of the Circuit were their personal reporters, and when such surviving judges held court in DuPage County, their own court reporters should have been in attendance. The fact that they might have been busy in other courts would make no difference whatsoever, as the statute specifically provides that "in case of the absence or disability of said reporter so appointed, the presiding judge may appoint any other competent reporter to act in his place during such absence or disability, which said substitute shall be paid by said official reporter for his said services."

Claimant also contends that if he has no right to recover under the statute relating to court reporters, this court has a right to allow an award under the provisions of the Court of Claims Act which gives it the authority to hear and determine "all claims * * * legal and equitable * * * which the State as a sovereign commonwealth should in equity and good conscience discharge and pay."

The right of this court to allow an award in any case solely on the grounds of "equity and good conscience," was before this court in the case of *Crabtree vs. State*, 7 C. C. R. 207, and after a full consideration of the subject, we there held as follows:

We conclude, therefore, that Section four (4) of paragraph six (6) of the Court of Claims Act, which provides as follows, to-wit: The Court of Claims shall have power: "to hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, ex contractu and ex delicto, which the State as a sovereign commonwealth, should, in equity and good conscience, discharge and pay"; merely defined the jurisdiction of the court,

and does not create a new liability against the State, nor increase or enlarge any existing liability; that the jurisdiction of this court is limited to claims in respect of which the claimant would be entitled to redress against the State either at law or in equity, if the State were suable; that this court has no authority to allow any claim unless there is a legal or equitable obligation on the part of the State to pay the same, however much the claim might appeal to the sympathies of the court; that unless the claimant can bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure such an award."

Under the decision in the Barrett case, the claimant has no legal right to an award, and therefore, under the law as laid down in the Crabtree case, he cannot invoke the principles of equity and good conscience to secure such award.

The law as laid down in the Crabtree case has been followed consistently by this court, and has been approved in many cases decided since that time. *Crank vs. State*, 9 C. C. R. 379; *Titone vs. State*, 9 C. C. R. 389; *Stanley vs. State*, No. 2697, decided in 1937; *Garbutt vs. State*, No. 2246, decided in 1937; *King vs. State*, No. 2295, decided in 1937.

Claimant also contends that if he is not entitled to recover by virtue of any statute of this State, nevertheless the Circuit Court, as a court of general jurisdiction, has inherent power to appoint the necessary attendants and assistants, and if no provision is made by statute for their compensation, they are entitled to the reasonable value of their services.

Whatever may be the law in the absence of a statute providing for the appointment of court reporters, it cannot be seriously contended that where the Legislature has specifically authorized the appointment of court reporters in a certain manner, that the Circuit Court or any of the judges thereof, have any inherent power to appoint in a manner contrary to the legislative authority. To hold in accordance with claimant's contention would be to nullify the legislative enactment.

In view of the conclusions we have reached in this matter, it is unnecessary to consider the other points raised by the Attorney General.

For the reasons above set forth, the motion of the Attorney General to dismiss must be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 2912—Claimant awarded \$988.00.)

LOUIS C. CHIAARA, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 13, 1938.

JOSEPH W. KOUCKY, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—Section 8, paragraph 1-3 of—objective symptoms—not confined to those which can be seen, or ascertained by touch. The term objective symptoms, as used in paragraph 1-3 of Section 8 of Act does not confine such symptoms to only those that can be seen or ascertained by touch, and symptoms of pain, and anguish, such as weakness, pallor, sickness, expressions of pain, clearly involuntarily, or any other symptoms, indicating an Involuntary deleterious change in the bodily condition may constitute objective symptoms within the meaning of said paragraph of said section.

SAME—injury aggravating pre-existing disease, resulting in disability—employer liable for compensation under. Where State employee sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra hazardous employment, which injuries aggravate a pre-existing disease or cause it to flare up, so that disability results, employer is liable for compensation for such disability.

SAME—medical and hospital services—other than furnished by State—procured at instance of employee—when State not liable for. Where it appears that the State had furnished proper medical and hospital services and was able and willing at all times to furnish all the necessary medical and hospital services to injured employee, and employee without any authority on part of State, or any evidence that services furnished were not proper, selected another physician and hospital, such selection is at the expense of claimant and State is not liable for the payment of such services.

SAME—temporary total incapacity—what constitutes. The period of temporary total incapacity is that temporary period after the accident during which the injured employee is totally incapacitated for work by reason of the illness attending the injury, and no compensation can be had for compensation for such incapacity where employee worked during the period for which claimed, even though it be shown that during time he suffered pain.

SAME—claim for compensation under, in nature of pleading—injuries not set forth in—when compensation for may be awarded. While claim for compensation is in the nature of a pleading, where it is sufficient to show the nature of the accident and the character of the injury, to such an extent that it fairly advises employer of the nature of the claim and enables him to ascertain the facts and prepare his defense, it is sufficient to allow the introduction of evidence showing the actual disability and to sustain an award to the extent justified by the evidence.

MR. CHIEF JUSTICE HOLLEBACH delivered the opinion of the court:

On July 20th, 1935, and for some time prior thereto, the claimant was employed by respondent as an attendant at Chicago State Hospital, Chicago, Illinois. On the last mentioned date, while on night duty and while waking one of the patients, about 5:45 A. M., claimant was assaulted by such patient, who grabbed him by the neck and threw him lengthwise across the rail of the bed in such manner that his head and shoulders were on the bed, his back was across the rail, and his feet were off the floor. The patient then dragged claimant on the floor, got on top of him, broke his glasses, and started to scratch his face before he could be removed.

Claimant reported the accident to his supervisor, but continued with his work and completed his work for the night at 6:30 A. M. He reported for work again that night, and continued to perform his duties regularly until October 22d, although he claims that he had pain all the time. About four weeks after the accident, the pain got so bad that he consulted Dr. Rooney, one of the doctors at the institution, who treated him therefor. There was no improvement in his condition and on October 22d, 1935 he was placed in the institution hospital where he continued to be treated by Dr. Rooney and by Dr. Meany, both of the institution, until November 15th, 1935. He then felt that his condition was not improving, and, after asking if he could get a release and go to another hospital, went to see Dr. Levinthal at Michael Reese Hospital. He remained at Michael Reese Hospital ten days and was then taken home. While at Michael Reese Hospital he was placed in a cast, and remained in such cast for eight weeks. He was off duty from October 22d, 1935 to January 14th, 1936, when he returned to his regular work as an attendant. Since January 14th, 1936 he has worked regularly as an attendant, although he claims he still has pains through the small of his back and down both legs, and was still taking treatment at the time he testified on July 23d, 1936. Since January 14th, 1936 he has received his regular salary, but for the period from October 22d, 1935 to January 14th, 1936 he received only two weeks' wages.

The medical testimony consists of the testimony of Dr. N. H. Adams who was called on behalf of the claimant, and

Dr. George E. Rooney, one of the regular physicians at Chicago State Hospital, who was called on behalf of respondent.

It appears that the claimant suffered from an involvement of the sciatic nerve some years prior to the time of the accident in question, but he claims that he had entirely recovered therefrom, and Dr. Rooney stated that he had seen claimant many times before the accident, walking about the grounds in normal fashion. Both doctors agree that there is a stiffness of the lower part of the back, and a limitation of motion in both legs, and from all of the testimony in the record, we are of the opinion that the injuries claimant received on July 20th, 1935 either caused a neuritis of the sciatic nerve, or lighted up the pre-existing sciatic condition, and produced the condition of which he now complains.

The evidence sufficiently shows that the respondent, in the conduct and management of Chicago State Hospital, is engaged in a hazardous occupation, within the meaning of those words as used in Section Three (3) of the Workmen's Compensation Act of this State, and it is not seriously contended that claimant and respondent were not operating under the Act at the time of the accident in question.

The evidence also shows that notice of the accident was given and claim for compensation made within the time required by the Act.

Claimant was thirty-three (33) years of age at the time of the accident and had two (2) children under the age of sixteen (16) years. His wages were Fifty Dollars (\$50.00) per month, plus maintenance estimated at Twenty-four Dollars (\$24.00).

The respondent contends:

1. That the claimant failed to prove by competent evidence that there were or had been objective symptoms or conditions not within the physical or mental control of the employee himself, and that therefore, under the provisions of Section 8, paragraph i-3 of the Compensation Act, claimant is not entitled to compensation:

Said Section 8, paragraph i-3 reads as follows:

Provided, further, that all compensation payments named and provided for in paragraphs (b), (c), (d), (e) and (f) of this section, shall mean and be defined to be for injuries and only such injuries as are proven by competent evidence, of which there are or have been objective conditions or symptoms proven, not within the physical or mental control of the injured employee himself."

Respondent seems to take the position that objective symptoms include only those which can be seen, or ascertained by touch. The same contention was made in the case of *Van Fleet vs. N. Y. Public Service Co.*, 111 Neb. 51; 195 N. W. 456. In that case, in considering such question, the court said:

"Defendant's idea is that by objective symptoms are meant symptoms of an injury which can be seen or ascertained by touch. We are of the opinion that the expression has a wider meaning, and that symptoms of pain, and anguish, such as weakness, pallor, sickness, nausea, expressions of pain clearly involuntary, or any other symptoms indicating a deleterious change in the bodily condition may constitute objective symptoms as required by the statute."

This question was considered by our Supreme Court in the case of *Powers Storage Co. vs. Ind. Com.*, 340 Ill. 498. In that case the court, on page 509, said:

"It is true that the injury was to the brain and the injury was not shown by an examination of the brain, but such an injury has a characteristic result, which was present in this case. *This result was an objective symptom proving the injury.* The second point under this head is that the symptoms shown by Ballauer were within his physical or mental control. This contention is based upon the fact that the motor function of the left side, and not the sensory functions, were affected, and it is contended that the appearance of paralysis could be stimulated. The paralysis in this case extended to the entire side, including the face, and is an objective symptom, though it might be possible for an exceptional individual to stimulate. There is no evidence in this case that it may be simulated or that tends to show simulation by the defendant in error."

The opinion of the court in the last mentioned case was approved in the case of *Plano Foundry Co. vs. Ind. Com.*, 356 Ill. 186.

In this connection it must be borne in mind that the respondent's witness, Dr. Rooney, was the treating physician; that therefore he was competent to testify as to the statements made to him by the claimant during treatment relating to his disability; that Dr. Rooney testified, among other things, as follows: that prior to the accident in question he had seen claimant many a time, walking around the grounds in normal fashion; that claimant is now partially disabled, and his condition is permanent; that the first time he examined claimant, the latter "had an inability of complete extending the leg" and "complained of severe pain when I went over the muscles and sciatic nerve on the right"; that claimant was then suffering terrific pain; that he was then unable to walk at all, and had to be carried; that there has been con-

siderable improvement in claimant's condition, otherwise he would not be able to walk at all; that if claimant had a predisposition to sciatic involvement, it would be very easy for such condition to flare up as the result of the fall he sustained; and that in his opinion, claimant was not malingering.

It is well settled in this State that when an accidental injury, which arises out of and in the course of the employment, aggravates a pre-existing disease, or causes it to flare up, so that disability results, the employer is liable for such disability. Angerstein's "Workmen's Compensation Act", section 52; *Peoria Terminal Co. vs. Ind. Bd.*, 279 Ill. 352; *Rockford Hotel Co. vs. Ind. Com.*, 300 Ill. 87; *Carson Payson Co. vs. Ind. Com.*, 340 Ill. 632; *Ervin vs. Ind. Com.*, 364 Ill. 62.

From a consideration of all of the evidence in the record, we are of the opinion that the results to the claimant were characteristic of the injury, and constituted objective symptoms proving such injury, and that therefore this contention of the respondent is untenable.

2. The respondent also contends that if claimant is entitled to an award, he is not entitled to any compensation for temporary total disability.

Claimant was injured on July 20th, 1935 and continued to work regularly thereafter until October 22d, 1935. In considering the question of what constitutes temporary total incapacity, our Supreme Court, in the case of *Mt. Olive Coal Co. vs. Ind. Com.*, 295 Ill. 429, said:

"The period of temporary total incapacity is that temporary period immediately after the accident during which the injured employee is totally incapacitated for work by reason of the illness attending the injury. It might be described as the period of the healing process. Temporary as distinguished from permanent disability is a condition that exists until the injured workman is as far restored as the permanent character of the injuries will permit."

The holding of the court in the last mentioned case has been approved in numerous cases since that time. *Stromberg vs. Ind. Com.*, 305 Ill. 619; *Consolidated Coal Co. etc. vs. Ind. Com.*, 311 Ill. 61; *Guest Coal Co. vs. Ind. Com.*, 324 Ill. 268; *Western Cartridge Co. vs. Ind. Com.*, 357 Ill. 29.

In the last mentioned case the Industrial Commission found that the employee had been temporarily totally disabled for a period of seven weeks, and that he then returned to work for a period of six weeks, at which time he again

became temporarily incapacitated for work, and that such incapacity lasted for 54-2 7 weeks, and thereupon entered an award for 61-2 7 weeks temporary incapacity. The Circuit Court approved the finding of the Industrial Commission in this respect, but the Supreme Court held that the Circuit Court was in error, and held that if the employee had any disability after his return to work, it must be classified either as partial or total permanent disability and not as temporary.

Under the holdings of our Supreme Court in the cases above cited, we are of the opinion that the claimant in this case is not entitled to compensation for temporary total incapacity.

3. In his complaint the claimant sets forth that he sustained injuries to his spine and right leg, and the respondent takes the position that he is not entitled to recover for any disability which he may have sustained to his left leg, on account of the fact that no claim was made therefor in the complaint.

A similar question was raised in the case of *Consolidated Coal Co. vs. Ind. Com.*, 322 Ill. 510, and in disposing of the same, the court, on page 517, said:

"An application for the adjustment of a claim for compensation is in the nature of a pleading and should be consistent with the findings of the commission in making the award. * * * It is not, however, a formal pleading and need not state all the elements of a cause of action, as is required in a declaration in an action at law. The application is sufficient if it states the nature of the accident and the character of the injury to such an extent that it fairly advises the employer of the nature of the claim and enables him to ascertain the facts and to prepare his defense. * * * The application was sufficient to allow the introduction of evidence showing the actual disability caused by the accident and to sustain an award to the extent justified by the evidence."

The contention of the respondent in this behalf is not well taken.

4. Respondent objects to the item of \$200.00 which claimant seeks to recover as the reasonable value of medical and hospital services rendered to him.

Section 8, paragraph A of the Workmen's Compensation Act provides that "the employer shall provide the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury. The employee may elect

to secure his own physician, surgeon and hospital services at his own expense."

The record as to the medical and hospital services furnished to claimant, other than the services furnished by respondent, is very unsatisfactory.

The State furnished all medical and hospital services from October 22d to November 15th, 1935, and on the last mentioned date, claimant went to Michael Reese Hospital and placed himself under the care of Dr. Levinthal. The only testimony in the record as to why claimant went to another hospital and secured another physician, is the following:

A) In his direct examination claimant stated (page 4):

"After 3½ weeks they couldn't do anything for me so I asked Dr. Rooney if I could get release and go to another hospital. I went to Michael Reese Hospital."

B) Dr. Rooney in his direct examination (page 4) said:

"He (claimant) showed little or no improvement while he was here, and for that reason was a little upset and he left to seek his own family physician, Dr. Levinthal."

There is nothing in the record to indicate what reply, if any, Dr. Rooney made to claimant's inquiry above set forth, nor is there anything to indicate that he was not receiving proper treatment. So far as the record discloses, the State was willing and able at all times to furnish the necessary medical and hospital services. There is nothing to indicate that the claimant was authorized by any duly authorized officer or agent of the respondent to go to another hospital, or to obtain other medical services at the expense of the State.

Considering all of the evidence in the record, we feel that the selection of Dr. Levinthal and Michael Reese Hospital was made by claimant upon his own responsibility, and without any authority on the part of the respondent, and inasmuch as claimant elected to secure such services without authority from the respondent, he must be held to have done so at his own expense.

The testimony of the medical witnesses both for the claimant and for the respondent shows that the claimant has a permanent disability of both legs and that the same resulted either directly from the injury he sustained on July 20th, 1935, or indirectly as a result of the aggravation of a pre-existing condition which was latent at the time of such injury.

Dr. Rooney's last examination of the claimant was at the time of the hearing on November 1st, 1937. His conclusions at that time were substantially as follows:

Right leg: Limitation of abduction, 50 to 55%. Limitation of flexion, 25%;—or 10% loss of the use of the whole leg.

Left leg: Limitation of flexion, 15%; or 10 to 15% loss of the use of the whole leg.

Upon consideration of all of the evidence, we find that the claimant sustained a permanent loss of 33-1/3% of the use of the right leg, and a permanent loss of 10% of the use of the left leg, and under the provisions of Section 8-e-15 of the Compensation Act, is entitled to compensation for 82 1/3 weeks at \$12.00 per week, to wit, Nine Hundred Eighty-eight Dollars (\$988.00), all of which compensation has accrued at the present time.

Award is therefore entered in favor of the claimant for the sum of Nine Hundred Eighty-eight Dollars (\$988.00).

This award being subject to the provisions of an Act entitled "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof", approved July 3d, 1937 (Session Laws 1937, p. 83) and being by the terms of such Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the general fund in the manner provided for in such Act.

(No. 3246—Claim denied.)

JAMES B. SIMPSON, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 1st, 1938.

CLYS PYLE, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—making claim for compensation within time fixed in—condition precedent to jurisdiction of court. Where no claim for compensation is made within one year after date of injury, or within one year after date of last payment of compensation, where compensation has been paid, the court is without jurisdiction to proceed with hearing on claim made thereafter.

MR. JUSTICE YANTIS delivered the opinion of the court:

The above matter comes before the court on a motion by respondent to dismiss the complaint. Application is made for compensation under the terms of the Workmen's Compensation Act of Illinois, and it appears that the injury in question was sustained on October 30, 1936 and the complaint was not filed until April 22, 1938. The Attorney General contends that as the claim for compensation was not filed within one year after the date of the injury or within one year after the date of the last payment of compensation, the court is without jurisdiction and the claim should be dismissed.

It appears that claimant was engaged as a laborer in the construction of S. B. I. Route No. 139 and while in the performance of his duties, on the 30th day of October, 1936, was struck by a State truck and suffered injury to his right leg; that he was removed to the hospital at Carmi where he received treatment until November 18, 1936. He received further medical attention until December 26, 1936, at which time he was discharged by the attending physician, Dr. Frank C. Sibley, of Carmi, who reported, "I have finished this case; no more treatments necessary." Claimant received temporary compensation of Seven and 50/100 (\$7.50) Dollars per week for a period of six (6) weeks, i. e. from October 31, 1936 to December 11, 1936.

We have repeatedly held, in accordance with the decision of our Supreme Court that,

"An application for compensation within the time required by the Act is jurisdictional."

Gettlinger vs. State, 8 C. C. R. 1;

Thompson vs. State, 9 C. C. R. 97;

Lewis vs. Ind. Comm., 357 Ill., 309.

"The Court of Claims shall have power to hear and determine the liability of the State for accidental injuries or death suffered in the course of employment by any employee of the State, such determination to be made in accordance with the rules prescribed in the Act commonly called the 'Workmen's Compensation Act'; the Industrial Commission being hereby relieved of any duty relative thereto."

Among the rules prescribed by the *Workmen's Compensation Act* are the provisions of *Section 24* which provides:

"No proceedings for compensation shall be maintained unless,

1. Notice of the accident is given as soon as practicable and not later than thirty days (fifteen in case of hernia).

2. Unless claim for compensation is made within six months after the accident.

3. Unless application for compensation is filed with the Industrial Commission within one year after the date of injury or within one year after date of last payment of compensation."

Counsel for claimant comments forcibly against the Attorney General resisting the claim at bar— not on its merits but upon the technicality of the law. Neither the Attorney General nor this court can enlarge the jurisdictional rights conferred upon this court by the legislature which established it. We must determine claims for accidental injuries in accordance with the rules prescribed in the Workmen's Compensation Act, and as that Act provides that application for compensation must be filed within one year, etc., no award could be allowed to claimant herein. If the merits of his claim would have entitled him to an award, it is unfortunate that his claim was not presented within a limitation of time that would have permitted this court to grant an award.

The motion of the Attorney General is allowed and the claim is dismissed.

(No. 3269—Claimant awarded \$202.72.)

SILVER FLEET MOTOR EXPRESS, INC., Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed October 13, 1938.

Claimant, pro se.

OTTO KERNER, Attorney General; MURRAY F. MILNE,
Assistant Attorney General, for respondent.

MOTOR FUEL TAX LAW—distributor under—no tax assessed against under. The Motor Fuel Tax is a privilege tax imposed upon the privilege of operating motor vehicles upon public highways, and is based on amount of fuel consumed in each motor vehicle, and while ultimately paid by consumer is collected in first instance by distributor, who is required to pay over to State such moneys, and same are not proceeds of a tax assessed against such distributor.

SAME—same—agent of State in collecting tax under. Motor fuel distributor collects tax from dealer, who in turn passes same on to consumer, and in collection of such tax the distributor acts as the agent of the State in that behalf.

SAME.—Overpayment of amount due from distributor—not payment of tax due under mistake of fact—may be recovered. Where motor fuel distributor made a mistake as to the amount of motor fuel tax collected by it from dealers to whom it made sales, and pays State an amount in excess of that collected or due from said dealers, such amount is not payment of a tax due from distributor, but payment of money, made under a mistake of fact, and an award may be made for the excess so paid.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On November 1st, 1937 the claimant, Silver Fleet Motor Express, Inc., of Louisville, Kentucky, obtained a certificate of authority to transact business in the State of Illinois, and a license as a distributor of motor fuel under the provisions of the Motor Fuel Tax Law of this State (Ill. Rev. Stat. 1937, Bar Assn. Ed., Ch. 120, pars. 417-434).

Claimant operated under such license until March 31st, 1938, at which time it ceased to do business within this State in such a manner as to require it to hold a motor fuel distributor's license, and such license was therefore cancelled.

The Motor Fuel Tax Law imposes a privilege tax on the operation of motor vehicles upon the public highways of this State at the rate of three cents (3c) per gallon on all motor fuel used in such vehicles upon such public highways. Such law also provides that no person shall act as a distributor of motor fuel without first securing a license from the Department of Finance. Applicants for such licenses are required to furnish a bond, and under the provisions of the Act are required to make a monthly return to the Department of Finance, showing an itemized statement of the number of invoiced gallons of motor fuel purchased, acquired or received; the amount sold, distributed and used; the amount lost or destroyed; and the amount on hand at the close of business for such month, etc.

Such Act further requires each distributor to collect from the purchaser at the time of such sale, three cents per gallon on all motor fuel sold, and at the time of making his return, the distributor is required to pay to the Department the amount so collected, less the actual cost of making the collection and payment, not to exceed two per cent of the amount so collected.

The claimant submitted its returns regularly as required by the Motor Fuel Tax Law, and paid the amount required to be paid in accordance with such several returns.

Claimant's return for the month of December, 1937, indicated that it had on hand an actual inventory at the end of such month in the amount of 138 gallons. Its return for the month of January, 1938, indicated an actual inventory at the beginning of such month in the amount of 7,057 gallons. It is apparent that there was an error in either one of such returns, as the inventory on hand at the end of December and the inventory on hand at the beginning of the next succeeding month should have been the same.

An investigation and audit conducted by the Motor Fuel Tax Division of the Department of Finance indicates that the inventory reported at the beginning of the month of January, 1938, was erroneous, and that such inventory should have been 138 gallons instead of 7,057 gallons. Inasmuch as claimant made payment on the basis of 7,057 gallons, there was an over-payment at the rate of three cents per gallon on 6,919 gallons. A further audit of the account of such distributor indicated an excessive deduction in the amount of 95 gallons over and over and above that allowed for temperature variations. Subtracting this excessive deduction from the aforementioned 7,057 gallons, leaves a net amount of overstated gallonage of 6,824, on which payment of motor fuel tax was made at the rate of three cents per gallon, to wit, \$202.72, which last amount claimant seeks to recover in this proceeding.

The purpose of the Motor Fuel Tax Law as set forth in Section 17 of the Act (par. 433) is "to impose a tax upon the privilege of operating each motor vehicle upon the public highways of this State, such tax to be based upon the consumption of motor fuel in such motor vehicle," etc.

The tax is a privilege tax imposed upon the privilege of operating motor vehicles upon the public highways of this State; and is based upon the amount of motor fuel consumed in each motor vehicle. The tax is paid, in the last analysis, by the ultimate purchaser (sec. 6, par. 422) but is collected in the first instance by the distributor, who is required to pay over to the State all moneys so collected by it.

The money which is collected by the distributor, and paid by it to the State, is not the proceeds of a tax assessed against such distributor, but of a tax which is ultimately paid by the consumer, but which, in the first instance, is advanced by and collected from the dealer by the distributor, and which

the dealer in turn passes on to the consumer. The collection of the tax is made through the instrumentality of the distributor, who acts as the agent of the State in that behalf. *People vs. Kopman*, 358 Ill. 497.

As between the claimant and the respondent, the payment made by the claimant pursuant to the several reports submitted by it, was not the payment of a tax, but was a payment made by an agent to its principal, in fulfillment of certain duties imposed upon it by law.

This case, therefore, is essentially different on the facts, from the cases which involve the voluntary payment of an illegal or excessive tax.

The law with reference to payments made under a mistake of fact is set forth in 21 R. C. L. 164, sec. 191, as follows:

"Where money is paid to another under the influence of a mistake of fact, that is, on the mistaken supposition of the existence of a specific fact which would entitle the other to the money, and the money would not have been paid if it had been known to the payer that the fact was otherwise, it may be recovered. The ground on which the rule rests is that money, paid through misapprehension of facts, in equity and good conscience belongs to the person who paid it. Municipal corporations as well as individuals are subject to this rule. An error of fact is ordinarily said to take place either when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist."

To the same effect see 48 Corpus Juris 759, sec. 318, and annotation in 87 A. L. R. 649; also *Stempel vs. Thomas*, 89 Ill. 146; *Wolf vs. Beaird*, 123 Ill. 585; *Blomstrom vs. Dux*, 175 Ill. 435-439; *Jenson vs. Muting*, 256 Ill. App. 514.

The payment made by the claimant in this case clearly was made under a mistake of fact, that is to say, a mistake as to the amount collected by it from the dealers to whom it made sales, and therefore, under the law as above set forth, claimant is entitled to the return of the amount so overpaid by it.

Award is therefore entered in favor of the claimant for the sum of Two Hundred Two Dollars and Seventy-two Cents (\$202.72).

(No. 2668—Claimant awarded \$1,200.10.)

CHARLES J. WEIDNER, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 13, 1938.

J. S. COOK, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—Claim for compensation for permanent partial disability—burden of proof in when award not justified. Where claim is made for compensation for permanent partial disability, the burden of proof is on claimant to show such disability and to establish his right to compensation therefor, and where it appears that his earning capacity is as great at the time of the hearing on such claim as before the accident, no basis is shown upon which to estimate an award for permanent partial disability.

SAME—when award for compensation for temporary total disability may be made. Where it appears that employee sustained accidental injuries, arising out of and in the course of his employment, while engaged in extra-hazardous employment, resulting in temporary total disability, an award may be made for compensation for same, in accordance with provisions of Act, upon compliance with provisions thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

Charles J. Weidner was an employee of the State Highway Department, and on February 2, 1935, while helping repair the highway on U. S. Route No. 6 near Morris, Illinois, he stepped from a truck to the tongue of a tar kettle wagon, slipped and fell about three feet, striking his back upon the pavement. On May 10, 1935 he filed his complaint herein, seeking an award of Four Thousand Eight Hundred (\$4,800.00) Dollars and a pension for life as a result of the injuries which he alleged he had sustained.

The medical report of Dr. Gordon M. Perisho under date of April 19, 1935 discloses the nature of the injury to be cerebral contusion, contusion of the right elbow, compression fracture of the third lumbar vertebrae and a sacro-illiac sprain. After being taken to the hospital he was placed in a plaster body cast for six weeks and this was followed by a Taylor spine brace for seven weeks longer. He was in the hospital four days, then remained in his home for one week; was returned to the hospital for Laboratory tests and X-ray examinations.

The claim is before the court on the original complaint, a report by the Division of Highways, dated June 24, 1935 consisting of accident report, doctors' reports and correspondence, a supplemental highway report of July 21, 1936 accompanied by a medical report by Dr. Thomas, Orthopedic Surgeon of Chicago, also the transcript of testimony of the sev-

eral witnesses and the Statements, Briefs and Arguments of the respective parties.

The record establishes that claimant was an employee of respondent and that both the latter and the claimant were operating under the terms of the Workmen's Compensation Act of Illinois at the time of said accident. Further, that the accident in question arose out of and in the course of claimant's employment. The application for compensation was filed herein within four months after the accident occurred, and the claim is properly before the court for consideration. The report of the Division of Highways shows that claimant commenced work for respondent December 1, 1934 and worked sixteen days in December, sixteen days in January, 1935, and two days in February, being paid at the rate of Forty (40) Cents per hour for an eight hour day. He was a maintenance helper. Such employment is not continuous throughout the year but is governed by that provision of statute which provides for a minimum number of working days of two hundred (200) in determining average annual wages.

Claimant contends that because he occasionally drove the truck from which he stepped at the time of his accident, his compensation should be determined under a Union scale for truck drivers at from Seventy-five (75) Cents to One (\$1.00) Dollar per hour. The record discloses no merit to this contention. He was hired as a maintenance helper and drew wages as a maintenance helper. His wages amounted to Three and 20/100 (\$3.20) Dollars per day. His annual wages were Six Hundred Forty (\$640.00) Dollars or an average of Twelve and 31/100 (\$12.31) Dollars per week. Under the provision of Section 8 (J) 2 of the Workmen's Compensation Act the amount of any temporary total disability allowable to claimant would be increased from the minimum of Seven and 50/100 (\$7.50) Dollars to a minimum of Twelve (\$12.00) Dollars per week by reason of there being two children under the age of sixteen (16) years dependent upon him at the time of such accident.

There is some conflict as to when the claimant was able to go back to work and as to when his temporary total disability ceased. Dr. John¹ Mitchell, under whose care claimant was for the greater portion of the treatments received by him, testified that in his opinion claimant was able to work from approximately September 1, 1935. On Page D-1 of the

record claimant testified that the first work he did was on November 1, 1936, when he worked for one month for O'Brien and Morris, Contractors at Four (\$4.00) Dollars per day. Later in his testimony (Page D-4) he stated that he had done no work prior to June 5, 1936 except driving his truck a few times for short distances.

Dr. Mitchell, an Orthopedic Surgeon, of Joliet, Illinois, testified that he first saw claimant on May 25, 1935. At that time he was complaining of a pain in the lower side and between his shoulders. There was some pain and pressure between the third and seventh Dorsal vertebrae but no pain to pressure in the Lumbar region. The X-rays that were taken of him showed Hypertrophic Arthritis. There was a limitation of motion in the forward bending which the doctor thought was due to a stiffness in his spine from non-use. The doctor was unable to state whether there had been a fracture or merely a spur from such arthritis; that there was no way to distinguish between the two because of the time that had elapsed between the time of the injury and the examination. Such arthritis, the doctor testified, is that type which produces an overgrowth of bone and not a destruction of bone. After massage treatments the patient had greater motion in the spine but there still remains some stiffness in the lumbar region; that he finished his treatment with the patient on July 30th, 1935, and believed he should have been able to go back to work within a month after that time. The doctor had no record of any injuries to claimant's right elbow, and the major portion of the complaint was as to pain between patient's shoulders. There was no complaint to Dr. Mitchell in regard to the sacro-illiac sections. The doctor further testified that the patient had no apparent pain when he left and complained only of stiffness in his back. From his treatment and examination the doctor testified that in his opinion the arthritis existed prior to the injury.

Claimant had previously been injured while working on the W.P.A. in 1934, at which time he had mashed his left foot and was laid up for about six months as a result thereof. He testified that he now has pains in the left hip, the lower part of the spine and in the left shoulder; that this pain comes and goes, usually occurring when he attempts to lift anything heavy, and lasts for as much as an hour at a time. Dr. N. H. Adams made an examination of claimant on January 22, 1936

and again on June 5, 1936. From the latter examination he testified that claimant could then bend over and touch his finger tips nearly to the floor. That patient is subject to pain in the left hip and that these pains would be due to the arthritic changes in the patient's spine; that in his opinion the patient could do light work in house or factories and that there is a causal connection between the patient's present condition and the accidental injury.

Dr. H. B. Thomas, Orthopedic Surgeon of Chicago, examined patient on June 5, 1936. He testified that they stripped the patient and X-rayed the body. "Patient complained of the coccygeal region in the spine but my examination of same disclosed negligible evidence of disability. The X ray of the sacro-illiac region showed Hypertrophic Arthritis but no evidence of injury. A negative condition was found in the Lumbar region. We found a compression fracture of the third vertebrae which plaintiff did not know he had. The arthritis found in the sacro-illiac joint was of a toxic formation known as traumatic." From his examination the doctor testified that in his opinion claimant was able to do the same type of work today that he was doing at the time of the injury. In the opinion of Dr. Thomas the pain complained of by claimant was not from the portion of the body affected by his fall but from other portions of the body as a result of the arthritic condition present. Because of the evidence of the fracture which claimant has sustained in the back however, the doctor testified that there was in his opinion a ten (10) per cent permanent disability existing, that could be attributable to the accident in question.

From a consideration of the entire record we must conclude that the end of claimant's total temporary disability was November 1, 1936 when he began working for the Contractors O'Brien and Morris, at wages in excess of those which he had been earning in the employ of respondent. In a report, dated May 27, 1935, Dr. Mitchell stated that in his opinion from an examination of the patient the latter should be able to return to work after removal of the brace which he was then wearing and some massaging of his spine to induce normal motion. Following this, on June 3, 1935, Dr. Perisho made his report, stating that in his opinion the patient was apparently "suffering from traumatic arthritis which has been definitely aggravated by the injury." The

doctor further reported that he had done everything he could for the patient." . . . he is still unable to return to work and further treatment by an Orthopedic Specialist was advised. Further treatment was authorized by the Examining Committee of the Health Department of the State of Illinois and Weidner was informed on June 8, 1935 that he might receive further treatment from Dr. Mitchell. In his testimony (Page C-3) the latter testified that he gave him massage treatments until July 30, 1935 thereby obtaining more motion in the patient's spine. The doctor further testified that in his opinion the patient was able to return to work approximately September 1, 1935. In his final testimony on August 7, 1937, Dr. Mitchell, who apparently had more care of the patient than any other doctor, was examined as follows:

"Q. State whether or not in your opinion the pains of which Mr. Weidner complains are a result of the injury incurred by him.

"A. I don't know. I can't answer that. His pains are subjective and I have to go by objective findings.

"Q. Do you find objective symptoms to substantiate the pains of which Mr. Weidner complains.

"A. I did at that time as he had stiffness in his back and pain upon pressure in the upper dorsal region.

"Q. The pain in the upper dorsal region was not, however, at the site of the injury?

"A. No."

The burden of proof is upon claimant to establish his right to permanent partial disability, and this he has failed to do. He has arthritis but apparently not from the injury suffered by him. His earning capacity is apparently as great now as before the accident, and no basis is shown upon which to estimate an award for partial permanent disability.

From a consideration of all the evidence the court finds that claimant is entitled to temporary total disability for a period of Ninety-one (91) weeks at the rate of Twelve (\$12.00) Dollars per week, or a total of Ten Hundred Ninety-two (\$1,092.00) Dollars. That he has heretofore received One Hundred Forty and 40/100 (\$140.40) Dollars compensation which leaves a balance of Nine Hundred Fifty-one and 60/100 (\$951.60) Dollars due him for temporary total compensation to November 1, 1936.

All of the bills shown by the departmental report filed May 27, 1938 to be still outstanding, for medical and hospital charges, were incurred with the approval of the respondent and are entitled to payment as follows:

| | |
|-------------------------------------|----------|
| Dr. Gordon M. Perisho..... | \$148.00 |
| Morris, Ill. Hospital..... | 85.50 |
| Dr. John Mitchell, examination..... | 15.00 |
| | <hr/> |
| | \$248.50 |

It is therefore ordered that an award be and the same is hereby allowed for the payment of said bills in the sum of Two Hundred Forty-eight and 50/100 (\$248.50) Dollars in favor of claimant for the use of the following, to-wit:

| | |
|-------------------------------------|----------|
| Dr. Gordon M. Perisho..... | \$148.00 |
| Morris, Ill. Hospital..... | 85.50 |
| Dr. John Mitchell, examination..... | 15.00 |
| | <hr/> |
| | \$248.50 |

It is further ordered that an award is hereby allowed claimant for an additional sum of Nine Hundred Fifty-one and 60/100 (\$951.60) Dollars for temporary total disability sustained by him in the accident in question, such award being payable in weekly installments of Twelve (\$12.00) Dollars per week. As the total amount so due has already accrued, the full sum of Nine Hundred Fifty-one and 60/100 (\$951.60) Dollars is payable at the present time.

This award being subject to the provisions of an Act entitled, "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," Approved July 3, 1937 (Sess. Laws 1937 p. 83), and being, by the terms of such Act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from said appropriation from the Road Fund in the manner provided for in such Act.

(No. 3208—Claimant awarded \$100.00.)

H. E. CALLAHAN, DOING BUSINESS AS CALLAHAN & CALLAHAN.
Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 11, 1938.

Award vacated November 10, 1938.

(No. 3185 - Claimant awarded \$223.48.)

RAYMOND BOYLE, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 13, 1938.

Rehearing denied November 16, 1938.

AUSTIN J. BARLOW, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—when award for compensation for permanent partial loss of use of arm may be made under. Where it appears that employee of State, sustained accidental injuries, arising out of and in the course of his employment while engaged in extra hazardous enterprise, resulting in permanent partial loss of use of arm, an award for compensation for same may be made in accordance with the terms of the Act, upon compliance with the terms thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

On January 15, 1937 and for more than a year prior thereto claimant had been in the employ of the State of Illinois as a highway maintenance patrolman in District No. 10. On that day about 1:30 A. M., while spreading cinders on U. S. Route No. 68, he was struck by an automobile driven at a high rate of speed by one John Eiselt, of 3711 South 54th Avenue, Cicero, Illinois. The record does not disclose what blame should be attached to John Eiselt or what, if any, efforts have been made to obtain damages from him.

Claimant was taken to the hospital and placed under the care of Dr. Dwight C. Reeves of Maywood. No fractures were found and claimant returned to work on March 1, 1937 and was thereafter released from service at the end of that month. He received full salary at the rate of One Hundred Twenty (\$120.00) Dollars per month, or One Hundred Eighty-one and 94/100 (\$181.94) Dollars as compensation for the period of his temporary total disability. He had no children under sixteen years of age at the time of the accident, and respondent had notice of the accident the following day. The claim was filed January 11, 1938.

The following bills have been paid by respondent in connection with claimant's accident:

| | |
|--|----------|
| Dr. Dwight C. Reeves, Maywood..... | \$ 71.00 |
| Berwyn Hospital Assn., Berwyn..... | 6.60 |
| Oak Park Hospital Assn., Oak Park..... | 15.00 |
| The Lido Pharmacy, Maywood..... | 6.40 |
| McNamara's Druggist, Maywood..... | 1.17 |
| Total | \$100.10 |

Claimant seeks a further award for temporary total disability and partial permanent disability, in such amount as may be found due him under the terms of the Workmen's Compensation Act. It appears from the record that claimant was unable to work as the result of his injuries from January 15, 1937 to March 1, 1937, or a period of six and one-half (6½) weeks. That his annual earnings for the year previous thereto were One Thousand Four Hundred Forty (\$1,440.00) Dollars. That an examination of claimant on April 13, 1938 before Doctors H. B. Thomas, Ernest Moore and A. R. Hollander, of the staff of the Illinois Research Hospital at Chicago, disclosed that claimant lost the hearing of his right ear at the age of six years, that about 1931 he submitted to an operation for the removal of a brain tumor, and as a result thereof suffered an impairment in hearing of his left ear; that he had been in poor physical condition over a long period of time; that there is a limitation of motion of the cervical spine; that there is some sclerosis of the shoulders; that there is some sclerotic condition of the blood vessels, possessed of some degree of chronic arthritis and a slight traumatization of the center of the spine. From the history of claimant's previous physical condition and of the accident in question, it is the opinion of the medical men that the slight traumatization of the spine, disclosed by the X-ray examination, has a causal connection to the accidental injury sustained by claimant on January 15, 1937, and aggravated the chronic arthritic condition in claimant's right shoulder; that the soreness and stiffness complained of by claimant affects the use of his right arm, and that he has sustained a specific loss of ten (10) per cent of the use of his right arm as a result of such accidental injury.

The record supports a finding of ten (10) per cent permanent partial loss of use of claimant's right arm.

His average weekly wage was Twenty-seven and 96/100 (\$27.96) Dollars per week. Under the provisions of Paragraph (b), Section 8 of the Workmen's Compensation Act he would

have been entitled to six and one-half ($6\frac{1}{2}$) weeks compensation for temporary total disability at the rate of Thirteen and 98/100 (\$13.98) Dollars per week, being fifty (50) per cent of his average weekly wage, or a total of Ninety and 87/100 (\$90.87) Dollars.

Under the provisions of *Paragraphs 13 and 17, Subsection (c)*, Section 8 of the Act, he is entitled to fifty (50) per cent of his average weekly wage for twenty-two and one-half ($22\frac{1}{2}$) weeks, or Three Hundred Fourteen and 55/100 (\$314.55) Dollars. He has heretofore been paid One Hundred Eighty-one and 94/100 Dollars (\$181.94) so that there remains due him the further sum of Two Hundred Twenty-three and 48/100 (\$223.48) Dollars.

An award is therefore hereby entered in favor of claimant for permanent partial disability for ten (10) per cent loss of use of his right arm in the sum of Two Hundred Twenty-three and 48/100 (\$223.48) Dollars. As the full amount has heretofore accrued full payment is now due.

This award being subject to the provisions of an Act entitled, "An Act Making an Appropriation to Pay Compensation Claim of State Employees and Providing for the Method of Payment Thereof," approved July 3, 1937 (Sess. Laws 1937 p. 83), and being, by the terms of such Act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from said appropriation from the Road Fund in the manner provided for in such Act.

(No. 2906—Claimant awarded \$424.07.)

ELLIS JOHNSON, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed November 16, 1938.

JOSEPH W. KOVCKY, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—when award for compensation, for permanent partial loss of use of hand may be made under. Where it appears that employee of State sustains accidental injuries, resulting in permanent partial loss of use of hand arising out of and in the course of his employment, which is engaged in extra hazardous employment, an award for compensation for same may be made, in accordance with the provisions of the Act, upon compliance with the terms thereof.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

For some time prior to, and on the 6th day of March, A. D. 1936, the claimant was in the employ of the respondent as an attendant at the Chicago State Hospital, Chicago, Illinois. On said date he was employed in the violent ward, and while attempting to separate two patients who were fighting, he was knocked down and sustained a colles fracture of the left wrist.

He was taken to the institution hospital where he was treated by Dr. Rooney and Dr. Meany of the institution; the arm was placed in a cast, and claimant remained in the hospital until April 5th, 1936, on which date the cast was removed and replaced by a splint. Claimant returned to his regular work on the same day, with his arm in a splint, but continued to receive diathermy and massage treatments for some time thereafter. All medical and hospital services were furnished by respondent, and claimant was paid his regular salary during the time he was off work.

The evidence clearly shows that claimant and respondent were both operating under the provisions of the Workmen's Compensation Act, and that the injuries sustained by the claimant arose out of and in the course of his employment.

His annual earnings during the year preceding the injury were \$936.00, and his average weekly wage was \$18.00.

Claimant at the time of the injury in question was married and had one child under sixteen years of age.

The only question in the case is the extent of the injury to claimant's left wrist. Dr. Rooney of the institution was one of the treating physicians, and testified on behalf of the respondent. He stated that it usually takes a year or a year and a half for a condition of this kind to return to normal. He examined the claimant on November 1, 1937 and from such examination testified, without objection, that the claimant has sustained the permanent loss of twenty-five per cent (25%) of the use of his left hand.

Dr. Adams who was called on behalf of the claimant, examined him for the purpose of testifying in the case, and testified, without objection, that on May 18, 1936 claimant has a loss of seventy-five per cent (75%) of the use of the hand, but that such condition was not permanent. He also testified, without objection, that at the time of the first hear-

ing, to wit, on July 23, 1936, claimant had a loss of fifty per cent (50%) of the use of the hand, and that such condition is permanent.

Under all the evidence in the case, together with the inferences which may legitimately be drawn therefrom, we are of the opinion that the disability to claimant's hand does not exceed 25%.

We find, therefore, that the claimant was temporarily totally disabled from the date of the injury to April 5, 1936, and that he sustained the permanent loss of 25% of the use of his left hand; that under the provisions of Section 8, Paragraphs (b), (c), (e) and (i) of the Compensation Act, claimant is entitled to receive three and one-seventh weeks' compensation at \$11.00 per week for temporary total disability as aforesaid, and 42- $\frac{1}{2}$ weeks' compensation at \$11.00 per week for the permanent loss of 25% of the use of his left hand; making a total of \$502.07;—all of which compensation has accrued at this time. From this must be deducted the sum of \$78.00 which was paid to claimant for non-productive time, as hereinbefore set forth, and which must therefore be considered compensation.

Award is therefore entered in favor of the claimant for the sum of Four Hundred Twenty-four Dollars and Seven Cents (\$424.07).

This award being subject to the provisions of an Act entitled "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," approved July 3d, 1937 (Session Laws 1937, p. 83) and being by the terms of such Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the General Fund in the manner provided for in such Act.

(No. 2753—Claim denied.)

ILLINOIS CENTRAL RAILROAD COMPANY, AN ILLINOIS CORPORATION
Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 16, 1938.

ALSCHULER, PUTNAM & JOHNSON, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR,
Assistant Attorney General, for respondent.

NEGLIGENCE—employers of State Charitable Institution—State not liable for. In the conduct of its charitable institutions the State exercises a governmental function, and is not liable to respond in damages for the negligent acts of the officers, agents, employees or inmates thereof, the doctrine of respondeat superior not being applicable to the State.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

It appears from the complaint herein that on May 16, 1934 the claimant delivered its certain railroad freight car known as Illinois Central car No. 229272, loaded with baled straw, to the Aurora, Elgin and Fox River Electric Company, a common carrier, at Coleman, Illinois, and said Electric Company on said date delivered the same to the respondent, within the grounds of the Elgin State Hospital at Elgin, Illinois; that said car was then in good condition and was delivered to the respondent solely to permit the respondent to unload therefrom the baled straw which was consigned to the respondent; that it was the duty of the respondent to use due care and caution to protect such car and to return the same to the claimant in the same condition in which it was received; that by reason of the carelessness and negligence of the servants and agents of the respondent, such car was damaged by fire on the night of May 16th, 1934, and rendered useless as a freight car, whereby claimant was damaged to the extent of \$960.73, for which amount it asks an award.

The Attorney General has moved to dismiss the case on the grounds that the State, in the exercise of its governmental functions is not liable under the doctrine of respondeat superior.

It is a well settled rule of law that in the maintenance of its public institutions, such as State Hospitals, the State exercises a governmental function. It is also well settled in this State that in the exercise of such functions, the State is not liable for the negligence of its servants and agents, in the absence of a statute making it so liable. *Symonds vs. Clay County*, 71 Ill. 355; *Mincar vs. State Board of Agriculture*, 259 Ill. 549; *Stein vs. West Chicago Park Commissioners*, 247 Ill. App. 102; *Gebhardt vs. Village of LaGrange Park*, 354 Ill. 234.

The rule as above set forth has been applied by this court in numerous cases involving the same principle as is

involved in this case. *Loges vs. State*, 8 C. C. R. 53; *Nafziger, Recr., etc. vs. State*, 8 C. C. R. 314; *Hussman vs. State*, 8 C. C. R. 414; *Unverfehrt vs. State*, 8 C. C. R. 577; *Titone vs. State*, 9 C. C. R. 389; *Lindner vs. State*, 9 C. C. R. 448.

Under the law as above set forth, we have no authority to allow an award, and therefore the motion of the Attorney General must be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 2796—Claimant awarded \$22.50.)

ROBERT L. SPALDING, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed November 16, 1938.

HOGAN & COALE, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*making claim and filing application for compensation within time fixed in, condition precedent to jurisdiction of court.* Where no compensation has been paid under Act, and no application for same is filed within time fixed in Act, court is without jurisdiction to proceed with hearing on claim filed thereafter.

SAME—*claim for medical service not claim for compensation—time within which may be filed not governed by Section 24 of Act.* Section 24 of Workmen's Compensation Act, fixing time within which claims for compensation for accidental injuries must be filed does not govern in claims for medical services, same not being claims for compensation.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Prior to and on the 19th day of November, A. D. 1934, claimant was in the employ of the respondent, and was engaged in setting out trees along S. B. I. Route No. 48 in Christian County. On the last mentioned date, he sustained accidental injuries to his back, which arose out of and in the course of his employment, as a result of which he was temporarily totally disabled from the date of the injury as aforesaid, to January 11th, 1935, on which date he resumed his previous employment. There was no permanent injury. Notice of the accident was given and claim for compensation on account thereof was made within the time required by Section 24 of the Workmen's Compensation Act, but no compensation was paid to claimant, and no application for com-

pensation was filed by him in this court until January 6, 1936.

Section 24 of the Compensation Act provides that "unless application for compensation is filed with the Industrial Commission within one year after the date of the injury, or within one year after the date of the last payment of compensation, the right to file such application shall be barred."

Our Supreme Court has repeatedly held that this provision is jurisdictional, and is a pre-requisite to the right to recover. *DuQuoin School District vs. Ind. Com.*, 329 Ill. 543; *Chicago Board of Underwriters vs. Ind. Com.*, 332 Ill. 611; *Inland Rubber Co. vs. Ind. Com.*, 309 Ill. 43.

The rule thus laid down has been followed by this court in numerous cases. *Crabtree vs. State*, 7 C. C. R. 207; *Dahler vs. State*, 8 C. C. R. 23; *Duke vs. State*, 8 C. C. R. 225; *Wolfe vs. State*, 8 C. C. R. 333.

Under the rule as above set forth, claimant is barred from recovering compensation for the injuries so sustained by him.

We have heretofore held that while the furnishing of medical and hospital services by an employer is provided for by the Workmen's Compensation Act, such services are not considered a part of the compensation to which the employee is entitled under such Act, and that therefore the time within which a claim for medical and hospital services may be filed, is not governed by Section 24 of the Compensation Act. *Wolfe vs. State*, 8 C. C. R. 333; *Elmendorf vs. State*, 8 C. C. R. 548; *Taden vs. State*, 9 C. C. R. 254.

The evidence discloses that claimant was attended by Dr. W. A. Monaghan from the date of his injury to January 10, 1935; that such services were reasonably worth \$22.50; and that the doctor has not yet been paid for such services.

Award is therefore entered in favor of the claimant, Robert L. Spalding, for the use of Dr. W. A. Monaghan, for the sum of Twenty-two Dollars and Fifty Cents (\$22.50).

This award being subject to the provisions of an Act entitled "An Act Making an Appropriation to pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," approved July 3d, 1937 (Session Laws 1937, p. 83) and being by the terms of such Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided for in such Act.

(No. 2972—Claimant awarded \$6,068.25.)

DELIA SCHIERER, WIDOW OF ALBERT C. SCHIERER, DECEASED, Claimant,
vs. STATE OF ILLINOIS, Respondent.

Opinion filed November 16, 1938.

CASSIDY & KNOBLOCK, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR,
Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—when oil inspector within provisions of. A person employed as an oil inspector in the department of the Illinois Oil Inspection, whose duties required him to take samples of gasoline, kerosene, etc., from railroad tank cars, containing from seven to eight thousand gallons, for the purpose of making tests thereof, was engaged in extra hazardous employment within the meaning of the Act.

SAME—same—when award for compensation for death of may be made. Where oil inspector employed by State, sustained accidental injuries, resulting in his death, while on way to his home to make tests for gasoline, etc., from samples taken from railroad tank cars, containing seven or eight thousand gallons, his home containing necessary equipment to make prescribed tests, which were always made at his home, such injuries arose out of and in the course of his employment, which was extra hazardous and an award for compensation may be made to those legally entitled, in accordance with the provisions of the Act, upon compliance with the terms thereof.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The amended complaint in this case alleges that Albert Schierer, deceased, on the 26th day of June, 1936, was in the employ of the State of Illinois, and had been in the employ of the State of Illinois many months prior thereto, as an oil inspector in the Department of the Illinois State Oil Inspection; that on said date, he was driving an automobile which was the property of the State of Illinois, on a highway in the County of Woodford, and State of Illinois, near the town of Washburn; that at said time he was performing his duties as State Oil Inspector; that sometime between five and six P. M., the automobile in which he was riding, collided with a motor truck operated by H. Hahn who resides in Toluca, Illinois.

The evidence discloses that Schierer was going around a curve in the road and Hahn was going in the opposite direction. Schierer stated after the accident that he did not see of the car at all until it hit him; that "it was around a bend, and he was driving toward the sunset".

Schierer received severe injuries, his left arm being severed from his body. He was removed to St. Francis Hos-

pital, Peoria, Illinois, where he remained a patient until his death on July 1st, 1936, death being the direct result of the injury suffered by him in this accident.

The annual earnings of the deceased during the year next preceding the injury were \$1,800.00.

Claim was filed herein on September 15th, 1936.

Deceased left his wife and four children: Mary Elizabeth, 18, Duane Schierer, 15, Arthur Schierer, 11, and Philip Schierer, 6, whom he was under legal obligation to support at the time of his injury, and they all reside at Metamora, Woodford County, Illinois.

In the complaint it is alleged that the decedent's doctors' bills were \$357.00; hospital bill, \$141.25; nursing services, \$63.00; ambulance service, \$15.00; and funeral expenses, \$400.00. The record shows that the hospital, doctors' and nurses' bills were all necessary and reasonable, with the exception of \$10.00 item hereinafter referred to.

Dr. Sumner M. Miller of Peoria testified that he was called by Dr. Charles Boon of Washburn to assist in the case of deceased; that he, Dr. Miller, was the chief surgeon in charge; that he was called on June 26, 1936 to the St. Francis Hospital in Peoria, Illinois. Dr. Miller testified that deceased had suffered traumatic amputation of the left arm, which was entirely off at the shoulder joint; that he was suffering from surgical shock which made impossible any attempt to treat the stump surgically, as he would have died had he attempted such a thing; that he did a minor amount of repair work on the stump, cleaned it up, put on hot dressings, treated him for shock for the relief of pain, and injected glucose solution in the veins and under the skin, with periods of intermission practically continuously and repeated at intervals during the next two days; that on June 29th, the deceased recovered from the shock; that his condition had so improved that they performed an amputation; that Dr. Boon was associated with him in the treatment of this case during this period and at the time of the amputation; that deceased reacted well from the operation, but within a few hours he became very sick and prostrated with great swelling of the tissues near the wound; that the wound was opened, and quantities of gas were expressed by pressure on the surrounding parts; that the wound was then opened widely for drainage; that solutions were again administered under the skin and in the veins.

and large doses of gas bacillus antitoxin were administered; that deceased became very toxic, rapidly becoming worse, went into collapse, and died on July 1st, 1936, of gas bacillus infection. Dr. Miller testified that he spent an hour or two the first night and three or four hours a day every day in giving him solutions and looking over him. He testified that the deceased died from gas bacillus infection resulting from contamination of the wound at the time the injury was received. For these services Dr. Miller testified that he made a charge of \$200.00, and that was a fair and reasonable charge.

Dr. C. L. Boon assisted with some of the work and he made a charge of \$25.00, and the evidence shows that this was a fair, reasonable and customary charge for the services he rendered. Dr. C. W. Magaret, who also assisted in the case in giving blood transfusions, made a charge of \$110.00, but the usual charge for such service is \$50.00 for each transfusion, and there is no evidence to support the charge for the extra \$10.00. \$24.00 was charged for the antitoxin, and that is a fair and reasonable charge. That was purchased and paid for by Dr. Miller, several bills having been rendered by the druggist who supplied it to Dr. Miller, and that is the usual and customary charge. Therefore, the sum of \$224.00 is due Dr. Miller. It was also necessary to have two nurses in attendance, a day nurse and a night nurse, and Dr. Miller testified that the usual and customary charge of nurses was \$6.00 a day, and that the hospital charged them \$1.00 for their meals, making \$7.00 per day for their charge.

Delia Schierer, wife of the deceased, testified that she paid Julia Fidler, one of the nurses, the sum of \$28.00, that being the usual charge. Miss Marie Henebry's bill was \$7.00 per day for five days, or \$35.00, but she was not paid. The bill of E. A. Rickett in the amount of \$15.00 for ambulance service was reasonable.

Delia Schierer, after the death of deceased, remarried on April 5, 1937.

Paragraph 6 of Section 3 of the Workmen's Compensation Act provides that the provisions of such Act shall apply automatically to all employers and all their employees, engaged in "any enterprise in which explosive materials are manufactured, handled or used in dangerous quantities". Paragraph 7 of Section 3 of the Compensation Act provides that the provisions of such Act shall apply to all employers

and all their employees engaged in any department of "any enterprise wherein . . . explosives . . . or inflammable vapors or fluids . . . are manufactured used, generated, stored or conveyed in dangerous quantities". Schierer's duties required him to obtain samples of gasoline, kerosene, etc., and to test the same. The samples were taken from railroad tank cars containing 7,000 to 8,000 gallons, upon the arrival of such cars at their destination in the territory assigned to said decedent, which territory comprised the greater part of five counties. At the time of the accident in question he was driving toward his home with a number of samples which he had obtained that day. All samples were taken by Schierer to his home and tested, for the reason that all testing had to be done where ice and the necessary electric current were available for the making of the prescribed tests. That such fuels were inflammable and explosive was shown by the fact that in February, 1936, the gasoline in one of the containers in the possession of said Schierer expanded until the container exploded, the gas ignited, and the flames spread to other containers and over the interior of the one-room building in which the tests were being made, and were put out by the local fire department which was called for that purpose.

Under all of the evidence in the case, and under the law as laid down in the case of *Gibson vs. Ind. Board*, 276 Ill. 75, we find that at the time of the accident in question Schierer and the respondent were operating under the Workmen's Compensation Act, and that the death of said decedent resulted from injuries which arose out of and in the course of his employment. Under the provisions of Section 7, paragraphs (a) and (h), and Section 8, paragraph (a), the respondent is required to pay compensation to the beneficiaries provided by such Act, in the total amount of \$5,500.00, together with the necessary medical, surgical and hospital services in the total amount of \$568.25, as shown by the evidence herein;—the total amount required to be paid being \$6,068.25. There is no authority under the provisions of the Workmen's Compensation Act for the allowance of the amount expended for funeral expenses.

We further find that the children's share of the compensation which accrued between the date of the death of the

decedent and April 5, 1937, should be paid to their mother for their support.

Award is therefore made and entered herein as follows:

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|---|-------------------|
| To Della Schierer, for the bill she paid to Julia Fidler..... | \$ 28.00 |
| To Della Schierer, for the use of Marie Henebry..... | 35.00 |
| To Della Schierer, for the use of Dr. Sumner M. Miller, for medical services of \$200.00 and antitoxin for which he paid \$24.00 | 224.00 |
| To Della Schierer, for the use of Dr. C. L. Boon..... | 25.00 |
| To Della Schierer, for the use of Dr. C. W. Magaret..... | 100.00 |
| To Della Schierer, for the use of E. A. Rickett on account of ambulance | 15.00 |
| To Della Schierer, for the use of St. Francis Hospital, for services, medical supplies, etc..... | 141.25 |
| To Della Schierer, for the use of herself and Duane Schierer, Arthur Schierer, and Philip Schierer, compensation from the date of the death of said decedent to April 5, 1937, to-wit, 39 5/7 weeks, at \$18.00 per week..... | 714.86 |
| To the duly and legally appointed guardian of Duane Schierer, Arthur Schierer, and Philip Schierer, the sum of \$4,785.14, payable in weekly installments of \$18.00 per week commencing April 5, 1937..... | 4,785.14 |
| Total | \$6,068.25 |

The total amount of the award to Della Schierer as above set forth has accrued and is payable at this time.

Compensation has accrued to Duane Schierer, Arthur Schierer and Philip Schierer from April 5, 1937 to November 15, 1938, to wit, 84 weeks at \$18.00 per week, in the amount of \$1,512.00, which is payable to their duly appointed guardian forthwith. The balance of the award to said Duane Schierer, Arthur Schierer and Philip Schierer, to wit, \$3,273.14, is payable to their duly appointed guardian in installments of \$18.00 per week from November 15, 1938 until such sum has been fully paid.

It is further ordered that such guardian, when appointed, shall furnish a certified copy of his, her or its letters of guardianship to the Auditor of Public Accounts of this State.

This court reserves jurisdiction of this matter for such other or further orders as may be in accordance with law.

This award being subject to the provisions of an Act entitled "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," approved July 3d, 1937 (Session Laws 1937, p. 83) and being by the terms of such Act, subject to

the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the General Fund in the manner provided for in such Act.

(No. 3166—Claimant awarded \$3,200.00 and pension.)

HAROLD POBANZ, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed December 20, 1938.

HARRY M. SCHRIVER, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—when award may be made under—complete disability—pension for. Where it clearly appears that employee of State sustained accidental injuries, arising out of and in the course of his employment, while engaged in extra-hazardous enterprise, resulting in complete permanent disability, an award for compensation for same may be made, including pension, in accordance with and subject to provisions of Act, upon compliance with the terms thereof.

SAME—employee on hourly basis—not employed continuously for one year preceding injury—average wage determined on 200 working days. Where it appears claimant, who was paid on hourly basis had not been in employ of State for one year preceding injury, and it is not shown that any other person in same employment was so employed during such period, his average earnings will be computed on the basis of 200 working days in the year.

MR. JUSTICE LINSOTT delivered the opinion of the court:

On December 17, 1937, claimant, by his then attorney, filed his claim averring that on the 11th day of October, 1937, he was employed by the Division of Highways of the Department of Public Works and Buildings of the State of Illinois, and was painting what is commonly known as the "West Como" bridge, which spans Elkhorn Creek, being part of S. B. I. Route No. Two, approximately four miles southwest of the City of Sterling, Illinois; that he was working on a ladder, and in some way the ladder slipped and the claimant fell to the ground, and as the result of the fall, he suffered a compression fracture of the first lumbar vertebra with complete severance of the spinal cord; fracture dislocation of the twelfth dorsal vertebra; complete paralysis of both legs; paralysis of the bladder and rectum and loss of sensation below the approximate site of the injury.

The Attorney General concedes that the claimant will be completely and totally disabled.

All the facts were stipulated and the court finds that it has jurisdiction of the subject-matter and of the person.

An operation was performed as soon as claimant was removed to the hospital. Claimant was confined to the Public Hospital in Sterling from the date of the injury until the 18th day of October, 1937, and he was then removed by the State to St. Luke's Hospital in Chicago. He was treated by Dr. Henry Bascom Thomas of the Northwestern University Medical School, Professor of Hygiene and Physical Education, Medical Adviser, Armour Institute of Technology and Instructor in Orthopaedic Surgery; also a surgeon in the Cook County Hospital for ten years, probably one of the most renowned in his profession in the State of Illinois.

Claimant is about 22 or 23 years old and the operating physician did not expect him to live beyond four or five months. He has very serious injuries and it appears from the stipulation and the statements of the doctors, that he is a hopeless cripple.

At the time of claimant's injury, he was receiving Fifty Cents (50c) per hour, and working eight hours per day.

The bridge where claimant was working was part of a hard-surfaced public highway and the Supreme Court of this State, and this court have held that:

"The construction and maintenance of a hard surfaced paved public highway is the maintenance and construction of a structure under the Workmen's Compensation Act."

City of Rock Island vs. Ind. Com., 287 Ill. 76, 79;

Bond vs. State, 7 C. C. R. 198, 199;

Pennington vs. State, 7 C. C. R. 253, 255.

The agreed statement of facts shows that the injuries arose out of and in the course of his employment. The evidence shows that the State had employed painters to do this kind of work between the first of April and they usually finished up along the first of November, depending somewhat upon weather conditions, but it does not appear that workmen, doing the kind of labor that claimant was doing, were employed 200 days of the year. The Workmen's Compensation Act provides that:

"As to employees in employments in which it is the custom to operate for a part of the whole number of working days in each year, such number, if the annual earnings are not otherwise determinable, shall be used instead of

200 as a basis for computing the annual earnings: *Provided*, the minimum number of days which shall be so used for the basis of the year's work shall be not less than 200."

The petitioner was unmarried. It appears that his injury is permanent and that he will not be able to do any kind of manual labor in the future.

Under Section 8 of the Compensation Act, in case of complete disability, compensation equal to fifty per centum of his earnings, but not less than \$7.50 nor more than \$15.00 per week, commencing on the day after the injury and continuing until the amount paid equals the amount which would have been payable as a death benefit under paragraph (a), Section 7, if the employee had died as a result of the injury thereof, leaving heirs surviving as provided in said paragraph (a), Section 7, and thereafter a pension during life annually, equal to 12 per centum and in other cases of total and permanent disability equal to 8 per centum of the amount which would have been payable as a death benefit if the employee had died as a result of the injury at the time thereof, leaving heirs surviving, as provided in said paragraph (a), Section 7. Such pension shall be paid monthly. *Provided*, any employee who receives an award under this paragraph and afterwards returns to work or is able to do so, and who earns or is able to earn as much as before the injury, payments under such award shall cease; if such employee returns to work, or is able to do so, and earns or is able to earn part but not as much as before the injury, such award shall be modified so as to conform to an award under paragraph (d) of this section: *Provided*, further, that if such award is terminated or reduced under the provisions of Section 8, such employee shall have the right at any time within one year after the date of such termination or reduction to file a petition with the commission for the purpose of determining whether any disability exists as a result of the original injury and the extent thereof; provided further, that disability as enumerated in Subdivision 18, Paragraph (c) of Section 8 shall be considered complete disability.

The claimant had not been in the employ of the State for a period of one year continuously preceding the injury, and it does not appear that there were any other persons who were so employed during such period of time in the same employment.

Claimant's compensation was Fifty Cents (50c) per hour, eight hours per day, or a total of Four Dollars (\$4.00) per day. Figuring on a 200 day year, his annual compensation would be \$800.00, and dividing said annual earning by the number of weeks in the year, or 52, makes an average weekly wage of \$15.38, or a compensation rate of \$7.69, since the claimant had no children under sixteen years of age at the time the injury occurred.

We, therefore, hold that claimant is entitled to an award equal to the death benefits as provided for under Paragraph (a) of Section 7, which provides for a death award of four times the annual earning. In this case that would be \$3,200.00. It would, therefore, appear that the claimant is now entitled to compensation from the 12th day of October, 1937, to the 20th day of December, 1938, or sixty-two weeks, at the rate of \$7.69 per week, or \$476.78, leaving a balance of \$2,723.22, which is payable at the rate of \$7.69 per week until the full amount is paid and after the payment of such an award, a pension for life at the rate of 12% annually or \$384.00 for the permanent loss of the use of both legs shall be paid to him at the rate of \$32.00 per month.

This award being subject to the provisions of an Act entitled, "An Act Making an Appropriation to pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," Approved July 3, 1937 (Sess. Laws 1927 p. 83), and being, by the terms of such Act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from said appropriation from the Road Fund in the manner provided for in such Act.

(No. 3230—Claimant awarded \$421.40.)

WALTER CAMM, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed December 20, 1938.

ALSCHULER, PUTNAM & JOHNSON, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—when award may be made under. Where it appears that employee of State sustained accidental injuries, arising out of and in the course of his employment, while engaged in extra hazardous enterprise, an award for compensation for same, may be made in accordance with the provisions of the Act, upon compliance with the terms thereof.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This claim was filed on March 16, 1938, and alleges that on the 23rd day of April, 1937, the claimant, Walter Camm, was an employee of the State of Illinois, and on that day, he was working on a road drag, replacing a blade, on S. B. I. Route 47. The blade had been raised off the ground by means of a jack, and while installing a new blade the drag slipped off the jack and fell to the ground, and claimant's second finger on his right hand was so badly injured that it was necessary to amputate it at the level of the middle of the second phalanx. Amputation was done by Dr. Emmett L. Lee of Aurora, Illinois, at St. Joseph Mercy Hospital.

The State of Illinois paid all the necessary medical, surgical and hospital bills in the total sum of \$56.75. Claimant remained in the hospital until April 29, 1937.

Claimant returned to work on May 10, 1937, and his temporary total incapacity was for a period of sixteen days.

On June 25, 1937, claimant was paid the sum of \$17.68 as compensation, and no further sum was paid to claimant.

All the facts are stipulated, and claimant seeks an award of \$480.09. The claimant had been in the employ of the State for more than one year prior to his injury, in the Division of Highways, Department of Public Works and Buildings. His annual earnings for a period of one year previous to April 23, 1937, was the sum of \$1,258.40. At the time of the injury, he was the father of one child under sixteen years of age.

It appears from the facts in this case that both claimant and respondent were under the Workmen's Compensation Act, and that the injury arose out of, and in the course of claimant's employment, and he is entitled to compensation for loss of his second finger on the right hand, which was amputated at the level of the middle of the second phalanx, as governed by Section 8 of the Compensation Act. His average weekly earnings were \$24.20; he had given respondent immediate notice of the accident and his claim was filed in due time.

Under the Compensation Act, claimant was entitled to temporary total incapacity at the rate of \$12.10 per week, for nine days, or the sum of \$15.58, and under Sub-section (c) he is entitled to an award for the complete loss of the finger,

or the sum of fifty per cent (50%) of his average weekly wage during thirty-five weeks. Thirty-five weeks at \$12.10 per week, equals the sum of \$423.50. The sum of \$423.50 plus the temporary total incapacity of \$15.58 equals the sum of \$439.08. However, the stipulation shows that he received the sum of \$17.68, which leaves the sum of \$421.40.

We hereby make an award to the plaintiff, Walter Camm, in the sum of \$421.40. He is entitled to be paid this sum at the rate of \$12.10 per week. If this sum had been paid at the rate provided by law, the whole amount would have been fully paid. He is, therefore, entitled to the sum of \$421.40 in cash.

This award being subject to the provisions of an Act entitled, "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," Approved July 3, 1937 (Sess. Laws 1927 p. 83), and being, by the terms of such Act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from said appropriation from the Road Fund in the manner provided for in such Act.

(No. 2915—Claim denied.)

ANNE C. DEUEL, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 14, 1938.

Rehearing denied December 20, 1938.

R. J. CANNELL, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—accident must arise out of and in the course of employment. To recover compensation under Workmen's Compensation Act, injury complained of must arise out of and in the course of the employment of the claimant.

SAME—same—when not shown to have. Where claimant, a field agent for Board of Vocational Education, sustains injury, as a result of being stuck in the finger by a pin, while pinning seat cover in her automobile, such injury is not an accidental injury, arising out of and in the course of her employment, there being no causal relation between her employment and the accident to her finger, as claimant was not being subjected to some special task incident to the particular employment in which she was engaged and which imposed upon her any greater danger than other persons.

MR. JUSTICE YANTIS delivered the opinion of the court:

On May 11, 1934 Anne C. Deuel was appointed Field Agent for Division 2, comprising ten northern Illinois Counties in the Division of Rehabilitation, Board of Vocational Education, at a salary of Two Hundred (\$200.00) Dollars per month. Her work consists of investigating cases of physically handicapped people and aiding in seeing that they obtain educational aid and remunerative employment. She and the other agents are required to travel about their district, using the cheapest and most expeditious methods of travel. Part of such travel is by train and part of it by personally owned automobile, for which the division allows her pay at the rate of Five (5) Cents per mile. In the conduct of her work it is sometimes necessary that the agent transport the client to or from medical offices or hospitals, arrange for surgical care, obtain necessary artificial braces and appliances when necessary, placing the patient for training in a trade or business school or factory, with visitations by the agent to the factories and other places to supervise such training work, later in placing the handicapped person in such employment as may be obtained. In interviewing prospective employers the agent finds it necessary to visit tailor shops, furniture factories, machine shops and other types of factories.

As the headquarters of the department under which claimant is employed are in the Centennial Building, owned by the State and located in Springfield, Illinois, a stipulation has been filed by claimant showing the number and type of elevators in such building and the number of stories, fire escapes, method of heating, lighting, machines and sharp-pointed instruments used in the building. It further appears that claimant's headquarters however were in Rockford, Illinois.

The record further shows that on December 20, 1935 claimant was returning to Rockford from Freeport, Illinois, where she had been calling on cases in the course of her duties. About nine miles east of Freeport she stopped her car to adjust the winter front of her automobile. In getting out of the car she pulled loose the seat cover and as she got back into the car she pinned the seat cover in place with an upholstery pin, and in so doing pierced the middle finger of the left hand at the second joint so that the pin entered the

tendon sheath. Soreness developed in the joint and infection resulted. During the night of December 23rd claimant had severe chills and fever and called Dr. Edward H. Weld on December 24th. The infection spread into the palm of the hand and on December 28th Dr. Weld opened the finger. The condition of the hand grew worse, and on January 1st patient was removed to St. Anthony's Hospital where the hand was again opened in three places and drains were inserted. Two other operations took place on January 20th and on February 13th, and on March 9th the patient was removed to the Passavant Hospital in Chicago where Dr. Koch, orthopedic surgeon, removed the tendon of the second finger from the middle of the palm to the tip of the finger. This also resulted in a stiffening of the third finger from the knuckle where it joins the palm leaving the finger stiff, so that she can flex it only about fifty (50) per cent of normal. The fourth or little finger can be flexed about seventy-five (75) per cent. The infection affected the other three fingers so that claimant cannot completely close the hand. She returned to work on the 1st day of April, A. D. 1936 and is still employed in the same work, but finds it necessary to employ a stenographer to take care of her records and correspondence. The medical and hospital service obtained by claimant resulted in numerous bills, as she had special nurses and five different doctors and surgeons, the total of such bills being One Thousand Two Hundred Fifty-five & 55/100 (\$1,255.55) Dollars, of which claimant has paid Nine Hundred Sixty-four & 55/100 (\$964.55) Dollars. These bills are as follows:

| | Paid | Balance due |
|--|-----------------|-----------------|
| Dr. E. H. Weld, Rockford, Illinois..... | \$100.00 | \$200.00 |
| Dr. E. W. Goembel, Rockford, Illinois..... | 10.00 | |
| Dr. E. G. Anderson, Rockford, Illinois..... | 3.00 | 2.00 |
| Dr. R. J. Mroz, Rockford, Illinois..... | 25.00 | |
| Dr. S. L. Koch, 54 E. Erie St., Chicago..... | 75.00 | |
| St. Anthony's Hospital, Rockford, Illinois.... | 275.00 | \$9.00 |
| Passavant Hospital, Chicago, Illinois..... | 115.55 | |
| Mrs. Marian Haines, R. N., Rockford, Illinois. | 28.00 | |
| Miss Ruth Anderson, R. N., Rockford, Illinois. | 28.00 | |
| Miss Phyllis Rosander, R. N., Rockford, Illinois | 305.00 | |
| Total | \$961.55 | \$294.00 |

Claimant was unable to return to her employment for a time, and was temporarily and totally disabled from December 24, 1935 to April 1, 1936.

During that time she received as salary, the sum of Six Hundred Forty-six & 15/100 (\$646.15) Dollars, all of which was for non-productive time. On May 15, 1929, plaintiff and her husband who later died on April 30, 1931, adopted two children, Betsy Deuel, aged nine years on August 1, 1936 and Reuben Deuel, aged eight years on March 2, 1936, both of said adoptions being under orders of approval by Judge Jarecki in the County Court of Cook County, Illinois. Plaintiff, by her amended complaint, filed August 5, 1937, seeks an award of Two Thousand Four Hundred Thirty-three & 83/100 (\$2,433.83) Dollars for temporary total disability, specific loss of the first, second, third and fourth fingers, and hospital, medical and nursing expenses, less a credit of Six Hundred Forty-Six and 15/100 (\$646.15) Dollars, heretofore received by her as salary for non-productive time.

Claimant was before the court for oral examination and there is no question as to a certain specific loss of use of the fingers in question. Notice of the accident and of claim for compensation were had by respondent within statutory limitations, and it is apparent from the record that the accident in question occurred in the course of claimant's employment.

The Attorney General has raised two other material questions, i. e.:

1. Was the claimant such an employee as to be entitled to the benefits of the Workmen's Compensation Act of the State of Illinois?

2. Did the accident arise out of the employment as well as during the course thereof?

As to the first of these issues, we believe the record discloses sufficiently that claimant's duties required her to go into various factories and shops and other places in the course of her supervisory duties, where machinery and sharp-edged cutting tools are known to be operated, that we may consider her and the respondent as both being within the terms of the Illinois Workmen's Compensation Act at the time of the injury. The question of when does an accident arise out of and in the course of the employment is in some cases difficult to determine.

Angerstein in his work on compensation (1930 Ed. p. 162) says:

"The title and section 1 of the Act make it clear, and the Supreme Court has also so construed it, that an employer is required to pay compensation

to, accidental injury or death only where the accident both 'arises out of' and 'in the course of' the employment. It is not sufficient that the injury occurs 'in the course of' the employment. It must also 'arise out of' the employment. As stated by the Supreme Court of another state construing a similar provision: 'In order to restrict beyond the reach of question the words 'in the course of the employment' the words 'arising out of' were added, so that the proof of the one without the other will not bring a case within the Act.'

"In other words it is well settled that to impose a compensation liability or to justify an award, the accident must have 'arisen out of' as well as 'in the course of' the employment, and the two are separate questions to be determined by different tests, for cases often arise where both requirements are not satisfied.

"The words 'in the course of' the employment relate to the time, place and circumstances under which the accident occurs, while the words 'out of' the employment relate to the origin or cause of the accident. 'In the course of' means about the same as within the scope of the employment. An employee may generally be said to be within the scope of his employment and an accident may be said to arise 'in the course of' the employment, when he is doing the work that he was employed to do, or while he is doing anything which a man so employed may reasonably do within the time during which he is employed and at a place where he may reasonably be during that time. It also may be stated that the scope of an employee's duties or employment is determined by what he was employed to do and what he actually did with the employer's knowledge and consent or was in the habit of performing as a part of his duties.

"An accident 'arises out of' the employment when it is peculiar to or incidental to the employment, or when it is something the risk of which might have been contemplated by a reasonable person when entering the employment as being incidental to it. 'Arising out of' has to do with the cause of the injury and there must be a causal connection between the work the employee is hired to do or the conditions, etc., under which he is required to work and the injury. So it may be said that if the accident is incidental to, and a part of and results from the work the employee was employed to perform, it arises out of the employment."

In the recent case of *Great American Indemnity Company vs. Industrial Commission*, cited in October, 1937, claimant sought compensation for injury to his eye, which he claimed to have suffered by getting a particle of foreign substance therein while returning to his office from a trip to the Municipal Court of Chicago, where he had been on business for his employer. An award by the arbitrator was confirmed by the Industrial Commission, and the latter's decision was confirmed by the Superior Court of Cook County. In reversing the judgment the Supreme Court said:

"Assuming that the accident occurred as alleged in the claimant's application, the question is presented whether the injury is compensable. A prerequisite to the right to compensation for an accidental injury is that it

must arise out of as well as occur in the course of the employment. The mere fact that the employment duties take the employee to the place of the injury, and that but for the employment he would not have been there, is not of itself, sufficient to give rise to the right to compensation, but there must be some causal relation between the employment and the injury. The causative danger must be peculiar to the work and not common to the neighborhood. (*Gooch vs. Industrial Com.*, 322 Ill. 586; *Mix Dairy Co. vs. Industrial Com.*, 308 Id. 549; *Mueller Construction Co. vs. Industrial Board*, 283 Id. 145.) The duties of an employee involving the necessity of using the streets, expose him to the risks of the street, but if the risk is of a general nature, not peculiar to the street, an injury occurring there does not necessarily arise out of the employment. In the *Mueller Construction Co.* case, after a consideration of many decisions in industrial injury cases occurring in the use of the streets, we said, 'The gist of the decisions seems to be that there must be some special risk incident to the particular employment which imposes a greater danger upon the employee than upon other persons using the streets. The criterion, however, is not that other persons are exposed to the same danger, but rather that the employment renders the workman peculiarly subject to the danger. The question is, then, did the circumstances of the employment of the defendant in error require him to incur some special risk in using the street in the way he did.' The employee, in that case, was required to ascertain the amount of material on hand, the amount needed for the construction work on which the employer was engaged and to take steps to obtain needed material. Upon contracts for some buildings the construction company had installed telephones on the premises, but for the work involved in that case it had not done so, in the absence of which the employee pursued the practice of using public telephones. While in the act of crossing a street to make a telephone call the employee was struck by an automobile.

"Three cases in which injuries on streets occurred are cited in the *Mueller Construction Co.* case, but they are distinguished from that case. A janitor was overcome by heat on the street while taking messages from one headmaster to another. In the second case a painter, in crossing a street to obtain paint, was knocked down and injured by a tramcar. In the third case a charwoman was sent by her employer to mail a letter. While on the street going to the post office she fell and broke her leg. No recovery was allowed in any of the cases. The basis of the decision in each case was that the injury sustained did not arise out of any special risk peculiar to the line of employment greater than that imposed upon others, but originated from a cause to which all persons who use the public streets, whether employed or not, are in an equal degree exposed."

(367 Ill. 241 at page 246.)

In the case at bar the injury resulted from the claimant sticking her finger with a pin while engaged in pinning a seat-cover which had come loose and which she was replacing. The court cannot find therein that claimant was being subjected to some special risk incident to the particular employment in which she was engaged and which imposed upon her any

greater danger than upon other persons. The accident did not occur through any causative danger which was peculiar to the work in which claimant was engaged. The Workmen's Compensation Act does not intend that the employer who comes within its provisions shall be an insurer of the safety of his employees. The burden was on the claimant to establish her right to compensation under the Workmen's Compensation Act, but she has failed to show casual relation between her employment and the accident to her finger. In line with the ruling expressed in the case of *Great American Indemnity Company vs. Ind. Comm. supra*, an award is herein denied and the claim dismissed.

Mr. Chief Justice Hollerich dissenting.

(No. 3062—Claimant awarded \$163.39.)

WILLIAM HENRY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed December 20, 1938.

THOMAS W. BORRELL, JR., for claimant.

OTTO KERNER, Attorney General; MURRAY F. MUEHL, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—no provision in for specific loss of use of ankle. Neither Section 7 or any other section of the Act makes provision for the specific loss of use of the ankle, but where such loss is proven, compensation may be made under Section 7, paragraph (e) thereof, covering loss of foot or loss of its use.

SAME—when award may be made under. Where it appears that employee of State sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra hazardous employment, an award for compensation for same may be made, in accordance with provisions of Act, upon compliance with terms thereof.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

For some time prior to, and on the 13th day of July, A. D. 1936, claimant was in the employ of the respondent as a road man in the Highway Department. On the last mentioned date, while in the performance of his duties at Elston and Westlaw Avenues, in Chicago, claimant was struck by an automobile owned by the Bowman Dairy Co., and injured about the left ankle, hip and side, also about his back and the left

side of his head. He was removed to Belmont Hospital where he was given first aid, and then removed to his home. He returned to his work on July 27th, and was paid his regular salary during the time he was disabled as aforesaid. All medical and hospital bills were paid by respondent, with the exception of \$12.00 which was paid by claimant.

Claimant's annual earnings during the year preceding the injury were \$1,500.00, and his average weekly wage was \$28.85. He had no child or children under the age of sixteen years at the time of the accident.

Notice of the accident was given, and claim for compensation was made within the time required by Section 24 of the Workmen's Compensation Act.

It appears from the evidence that prior to the accident in question claimant had an arthritic condition; that such condition was aggravated as the result of such accident; that claimant now has a permanent disability to his left foot; and that such disability is the result of the accident he sustained on July 10th, 1936 as aforesaid.

The only question in dispute is the extent of such disability.

The only medical testimony in the record is that of Dr. Andrew H. Frankel and Dr. H. B. Thomas. Dr. Frankel testified for the claimant and stated, without objection, that in his opinion claimant sustained the loss of 25% of the use of his left *ankle*. Dr. H. B. Thomas testified on behalf of the respondent, without objection, that in his opinion claimant sustained the loss of 10% of the use of his left *foot*.

The amount of compensation to which claimant is entitled is governed by Section 7, Paragraph (c) of the Compensation Act. Such section provides for compensation "for the loss of a foot, or the permanent and complete loss of its use, fifty per centum of the average weekly wage during 135 weeks"; also "for the loss of a leg, or the permanent and complete loss of its use, fifty per centum of the average weekly wage during 190 weeks".

Neither said Section 7 or any other section of the Act makes provision for compensation for the specific loss of use of the ankle.

Upon consideration of all of the evidence, we find that claimant has sustained the loss of ten per cent (10%) of the use of his left foot.

We therefore find as follows:

1. That claimant is entitled to have and receive from the respondent the following sums, to wit:

Fourteen Dollars and Forty-two Cents (\$14.42) for one week's temporary total disability, that being the period for which such compensation is payable under Section 8, paragraph (b) of the Compensation Act.

2. One Hundred Ninety-four Dollars and Sixty-seven Cents (\$194.67) for the loss of ten per cent (10%) of the use of his left foot as provided by Section 7, Paragraph (c), subparagraphs 14 and 17 of such Act.

3. Twelve Dollars (\$12.00) for medical services paid for by claimant:—making a total of Two Hundred Twenty-one Dollars and Nine Cents (\$221.09).

We further find that all of such compensation has accrued at this date; that claimant was paid his regular salary amounting to Fifty-seven Dollars and Seventy Cents (\$57.50) during the time he was disabled; that the amount so paid must be deducted from the compensation to which he is entitled as above set forth.

Award is therefore entered in favor of the claimant for the sum of One Hundred Sixty-three Dollars and Thirty-nine Cents (\$163.39).

This award being subject to the provisions of an Act entitled "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," approved July 3d, 1937 (Session Laws 1937, p. 83) and being by the terms of such Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund, in the manner provided in such Act.

(No. 2406—Claim denied.)

WILLIAM J. CONNELL, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed December 15, 1937.

Rehearing denied December 20, 1938.

ANDREWS & YOUNG, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—payment of compensation for temporary total disability—award for serious and permanent disability on claim alleging no other disability—review of original disability precluded on claim for additional compensation under Section 19 (h) of. Where claimant received compensation for total permanent disability during full period thereof and secured award for serious and permanent disfigurement on claim filed only therefor, the fact of the injury and the disability arising therefrom, as it existed at the time of the hearing on such claim, are not open to review on claim filed for additional compensation under Section 19 (h) of Act, for recurrence of or increase of disability, since said hearing, resulting from accident for which compensation was paid.

SAME—when award for additional compensation under Section 19 (h) of, must be denied. No award for additional compensation for recurrence of or increase of disability can be made under Section 19 (h) of Act, when there has been a hearing and an award made for compensation, where the record is insufficient to support the claim of such recurrence, or increase of disability, and where it appears that the disability for which such additional compensation is sought is the same or less than at time of former hearing and award.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant was injured on June 21, 1933. He was employed by the State of Illinois as a painter and was returning to the Dixon Paint Shop after putting up highway signs near Kewanee, Illinois. The State truck in which he was riding collided with another vehicle and as a result, claimant received serious facial injuries and lost several teeth which thereafter necessitated the procurement of a false plate, which was furnished by the State. He was unconscious for several hours and was treated in a hospital at Annawan. He returned to work July 17, 1933 and received his full pay during his temporary incapacity. All medical, hospital and dental bills, incurred by him prior to March, 1935 were paid by respondent. On June 26, 1934 claimant filed his claim with this court for "\$1,000.00 additional compensation for serious and permanent disfigurement to face and head—under Paragraph 8(c) of the Workmen's Compensation Act." An award was entered in claimant's favor for the specific disfigurement claimed, in the sum of Five Hundred (\$500.00) Dollars; such award being found in the opinion appearing in S. C. C. R. p. 452, decided March 13, 1935. Counsel for claimant in his final brief and argument in that case asked that the "Claim be allowed to stand open, so that if in the future the consequence of the concussion and injuries become so serious as to amount to incapacity, claimant will not be barred

from having any further award to which he may be entitled under the law." The court declined to continue the case on the docket and in its opinion ruled, that any question as to increasing disability that plaintiff desired to urge in the future would be controlled by the terms of the Workmen's Compensation Act.

Plaintiff continued to work regularly for the State until November 25, 1935. On January 13, 1936 he filed a petition to review the previous award, alleging that at the time he filed his original complaint and at the time of the hearing thereon, "certain further injuries described in his complaint were considered to be so indefinite that they did not amount to a disability—that on or about November 25, 1935 these certain pains and headaches became so acute he was forced to obtain medical treatment therefor—that his disability has increased to such an extent he has been unable to work since November 25, 1935 and has necessarily incurred medical and hospital expense of approximately Four Hundred Fifty (\$450.00) Dollars; further, that he has received no compensation since November 25, 1935, and requests additional compensation under the provisions of Section 19 (b) of the Workmen's Compensation Act."

A motion by respondent to strike the petition was denied, plaintiff's motion for review granted, and additional evidence by claimant and medical authorities has been introduced.

It now appears from the transcript of additional evidence, that in November, 1935, claimant complained to his superior at the Dixon Paint Shop, Mr. Goeke, that the headaches and pain in his neck had increased, and that Mr. Goeke advised him to again go to Dr. Young, the physician who had attended him immediately following his accident, and for him to follow Dr. Young's orders; that the latter examined him and sent him to Dr. Mock, and the latter sent him to St. Luke's Hospital where he remained from November 25, 1935 until January 25, 1936 and to which he again returned from February 25, 1936 until March 4, 1936. Contrary to claimant's statement in his petition for review and contrary to the affidavit of his counsel, filed January 13, 1936, "That he had received no compensation," the record shows that compensation had in fact been paid to him from the time he stopped work on November 25, 1935 until May 23, 1936, the last of

such payments having been made to him on June 4, 1936, and such compensation being, according to his testimony, the amount of one-half ($\frac{1}{2}$) pay, plus ten (10) per cent additional for two children, or approximately Sixty (\$60.00) Dollars per month.

"Any right which the claimant has at this time must be by virtue of Section 19 (h) of the Compensation Act. The fact of the injury and the disability arising therefrom, as it existed at the time of the original hearing, are not open to review."

(*Summit Coal Co. vs. Ind. Com.*, 308 Ill. 121.)

Only the extent of the disability, so far as the same may have recurred, increased, diminished or ended, is a proper subject matter for consideration at this time.

At the time of the original hearing plaintiff represented in his complaint that "In addition to his disfigurement, the accident had resulted in a condition in the back of his head and neck, which constantly caused him to be afflicted with reverse headaches at frequent intervals." No award was asked for the physical discomfort or disability caused thereby, but the existence thereof was established by the record. If such condition justified an effort to obtain compensation at that time, claimant had a right to contend therefor. This, he elected not to do, representing at the time of the hearing, as above indicated, that such further injuries were considered to be so indefinite that they did not amount to a disability. This was the conclusion of claimant and his counsel at that time, notwithstanding that claimant had been a continuous patient of Dr. J. M. Young of Annawan from the date of the injury, and had been receiving medicine, massage and diathermy treatments for his neck and head during all of the time prior to the original award.

Unless the disability as it existed at the time of the former hearing has increased therefore, no award can now be granted as prayed for under the provisions of Section 19(h). What is the evidence? On August 24, 1936 claimant testified that he went back to work about July 15, 1934; that he had pain at that time in the back of his neck and at the base of the skull; that such pain was constant and that it had never ceased since the injury, and that he had such pain at all times when working. The record shows he had been back at work for nine months at the time the previous award was entered. The only testimony given by him as to an increase in physical

disability since the former hearing, is his statement, that "along in November, 1935 his neck was getting worse right along—that the nerves or cords pulled toward the left side." He further testified that the treatment given him by Dr. Young consisted of massage, some pills and some medicine to rub on the back of his neck; that Dr. Mock advised "light treatments," and it was that form of treatment that he was given at the hospital; that since he returned home his treatment has consisted of "sitting in the backyard two or three hours and then going in and having his wife massage the back of his neck."

Dr. James M. Young, a witness called by plaintiff, testified that he had examined plaintiff on June 21, 1933 immediately following claimant's accident. He described the patient's facial and head injuries as existing at that time, stated that the neck was then rigid and that plaintiff complained constantly of pain in his neck and face; that he again examined the patient in November, 1935, at which time plaintiff complained of the same stiff condition of the muscles of the neck and of extreme pain; that he, Dr. Young, did not find anything out of the ordinary or abnormal about the patient in November, 1935, except apparent pain from motion of the head. Dr. Young again examined plaintiff about August 3, 1936 and testified as follows in regard to his condition then:

"Q. Did you examine him three weeks ago (i. e., August 3, 1936?

A. Yes, Sir.

Q. Did you observe any abnormal condition at that time?

A. Nothing other than the constant stiff condition of the muscles of neck and pain on moving the head forward or laterally.

Q. Have the complaints of the claimant with reference to pain in the neck and the back of the head been constant since his original injury?

A. Apparently so. Everytime I have seen him he has complained of the same thing.

* * *

A. The symptoms were mostly subjective.

Q. Dr., did you say that you found the condition of Mr. Connell any different at the last examination than you did at the last examination between the period of July 30, 1933 and January 1, 1934?

A. I think it is not as rigid. There is not as much pain at times. There was extreme pain then.

Q. With reference to Mr. Connell's condition last November and his condition as you found it at the time of your last examination, do you find he is in better condition, as far as his ability to work is concerned, now than he was then?

A. I think some of the rigidity has left the muscles and he might have improved somewhat since last November.

Q. Was that condition that you found last November prevalent during the preceding year?

A. Yes, Sir."

Dr. Young further stated that in his opinion plaintiff was unable to engage in ordinary labor, but it also developed in the course of his testimony that he did not know that plaintiff had in fact returned to his work in 1933 and had in fact worked thereafter until November, 1935, or that he had previously been allowed compensation and an award. However, during all this period from July 30, 1933 and continuing to February 20, 1936 plaintiff had received medicine, treatments and massage from Dr. Young from one to six times per month, as evidenced by the latter's bill, filed February 10, 1937.

Dr. Harry E. Mock, one of the Senior Surgeons of St. Luke's Hospital in Chicago, and a member of the Faculty at Rush Medical and Northwestern Medical Schools, was also called as a witness on behalf of claimant. He testified that he first examined plaintiff on November 25, 1935, and received a history of the case from plaintiff at that time. Dr. Mock stated,

"That he found no external evidence of injury to the head or neck. Head was erect but there was a restriction in flexion of forward and lateral movement due to some rigidity of the muscles of the neck. No sensory changes in the back of the neck. Found pain or tenderness in the cervical vertebrae by pushing hand on them. Complaint by patient of pain in jaws, but no abnormalities found there. Found a considerable thickening between the vertebrae, a condition of Osteitis. Condition resembles Osteoarthritis changes rather than fracture changes. Patient has eight cervical vertebrae instead of the usual seven. The condition of stiffness in the neck, tenderness and rigidity improved under rest, heat, massage, and exercise of the neck. The fifth cervical vertebrae showed some deformity and the lines suggestive of a fracture in the lateral process on the left side. At this late date it would be impossible for me to say absolutely that this was a fracture, but I can say it is suggestive of a fracture. The localized new bone formation found there could either be callous or it could be an Osteoarthritic change. I came to the conclusion that this patient may or may not have had a fracture in the fifth cervical vertebrae, but he has developed localized Osteoarthritis. If that was a fracture in the fifth cervical vertebrae, new bone has been forming since the day of the injury. It is wasn't a fracture it has been forming from two or two and one-half years. My opinion when I saw Mr. Connell on March 4, 1936 was that he might start at very light work and gradually get himself back into condition where he could do ordinary labor."

Dr. Henry Bascom Thomas, a Senior Orthopedic Surgeon of St. Luke's Hospital in Chicago, and an outstanding authority on Orthopedic Surgery, testified

"That he gave plaintiff a general examination to test his various reflexes. That patient holds his entire spine somewhat resistant, but can touch chin to chest and backward bending of neck is quite free. Very little limitations of motion actually found in the neck in any direction. Felt a pulling on the left side when patient brought his right ear over to the right shoulder. X-rays show an arthritic spur on the anterior surface of the sixth cervical vertebrae. Also a large spur found on the back of the skull. If you touch patient's skin very lightly he jumps. That is mental, a sign of fear. I believe he ought to be able to work with his back the way it is. In my opinion the pain which Mr. Connell shows upon contact is hysterical, and that there is no physiological disability that would prevent him working as a laboring man. From my experience and observation in many types of cases, the spur appearing below the seventh cervical vertebrae of plaintiff was too big to have grown since June, 1933. In my judgment it is an old spur."

No sufficient showing appears from the record to support the claim that there has been a recurrence or increase of plaintiff's disability since the former hearing and award. While plaintiff may have a condition of Osteoarthritis existing, it is not shown to be the result of the accident in question. It further appears that whatever pain and disability plaintiff may have in the head and neck is the same or less now than at the time of the former hearing, and the record does not entitle plaintiff to any additional award. Any further allowance by virtue of the provisions of Section 19(h) is denied and the claim is dismissed.

(No. 3296—Claimant awarded \$3.56.)

GULF REFINING COMPANY, Claimant, vs. STATE OF ILLINOIS
Respondent.

Opinion filed December 21, 1938.

Claimant, pro se.

JOHN E. CASSIDY, Attorney General; MURRAY F. MURPHY,
Assistant Attorney General, for respondent.

SUPPLIES—lapse of appropriation out of which bill could be paid—no payment—when award for may be made. The facts in this case are the same as those in the case of Indian Motor Cycle Co. vs. State, 9 Court of Illinois Reports, page 526, and opinion in that case is controlling herein.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks an award for Three and 36/100 (\$3.36) Dollars for twenty (20) gallons of gasoline at a contract price of Three and 36/100 (\$3.36) Dollars sold to L. F. Doyle, Maintenance Patrolman, for the use of respondent's Division of Highways. The gasoline was bought under purchase order No. B87830 in January, 1937 at Decatur, Illinois, and claimant failed to submit its bill prior to the time the appropriation out of which payment could be made, had lapsed.

The commodity was bought in the due course of regular purchase and the allowance of the bill is proper under the law pertaining thereto:

"Where claimant has rendered services or furnished supplies to the State on the order or request of an official authorized to contract for the same, and submits a bill therefor within a reasonable time, and due to no neglect or fault on the part of claimant, same is not approved and vouchered for payment before the appropriation from which it is payable lapses, an award for the reasonable and customary value of the services or supplies will be made where at the time the expenditure was contracted there were sufficient funds remaining in the appropriation to pay for same."

Indian Motor Cycle Co. vs. State, 9 C. C. R. 526.

Claim allowed, and award made in favor of claimant in the sum of Three and 36/100 (\$3.36) Dollars.

(No. 3102—Claim denied.)

JOHN ALLEN, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed January 11, 1939.

GLENN RATCLIFF and LACHLAN CRISSEY, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—burden of proof on claimant in claims under. The general rule of law that the burden of proof is upon the plaintiff to prove his case by a preponderance or greater weight of the evidence is applicable to claims under Workmen's Compensation Act.

SAME—when claim for compensation under cannot be sustained. Where, after giving full credence to the medical and other testimony adduced by claimant, the record fails to show that claimant was temporarily totally disabled or that he had suffered and will continue to suffer permanent partial disability, claim for compensation cannot be sustained, and an award must be denied.

MR. JUSTICE LANSFORD delivered the opinion of the court:

John Allen made application for adjustment of claim for compensation under the Workmen's Compensation Act for an injury alleged to have occurred while he was working for the Department of Public Works and Buildings in the Division of Highways of the State of Illinois, on the 5th day of July, 1935, as a laborer for the State Highway Maintenance Patrolman in the District of Peoria about two miles west of Havana, Illinois, on State Highway Route No. 78.

From the record before us, it appears that the parties to this litigation were under and subject to the provisions of the Workmen's Compensation Act; that the accident to Allen arose out of and in the course of his employment; that notice of the accident was made in accordance with the Act; that medical and surgical aid had been furnished to Allen by the State and that he has been paid as to the result of his injuries by the State, at the rate of \$9.60 per week up to the 20th day of February, 1936; all told he received the sum of \$316.80. The record shows that he was a married man but had no children under sixteen years of age.

At the time of the accident, claimant was coupling a two-wheel concrete mixer to a truck. In some manner his foot slipped and he fell, injuring his groin and hips. The evidence shows that this accident occurred about 4:00 on the 5th day of July, 1935; that claimant worked until about 7:00 that evening and also the next day. Having been advised by his foreman to see a doctor, he consulted Dr. R. T. Ewan on July 8, 1935. Dr. Ewan's examination disclosed a large external ring in the inguinal canal and from his examination, Dr. Ewan diagnosed the case at the time as beginning hernia. He also examined the claimant a number of times after that, but at later examinations, he was unable to find any hernia. At the time of the hearing, he had not examined the claimant for some eight or nine months. The hearing was on the 12th day of August, 1937.

The claimant requests compensation from the 20th day of February, 1936, to the 1st day of April, 1937, at the rate of \$9.60 per week, making 58 weeks at the rate of \$9.60 per week, or a total of \$556.80, and also claims a permanent partial disability and requests compensation to be paid to him at a rate of \$6.00 per week for a period of eight years, amounting to the further sum of \$2,496.00, making a total of \$3,052.80.

The question for the court to determine is the nature and extent of claimant's injuries, whether he continued to suffer from temporary total disability from the date of the last compensation until April 7, 1937 and whether he has suffered and will continue to suffer permanent partial disability from the date of the accident for a period of eight years.

Claimant had been a farmer and a day-laborer. A number of former co-employees testified. One or two of them testified that he had a hernia. They were not physicians and had never examined him. All agreed that he was not as good a worker as he had been prior to the accident; that he had been employed for a part of the time on WPA work and had loaded long poles on a wagon or other conveyances for the purpose of sawing them up for himself. Manifestly, under the evidence, he was not totally disabled.

The burden is upon the claimant to prove by a greater weight or preponderance of the evidence, his actual condition, and loss of wages, if any, before this court can make an award.

Claimant contends that he suffers great pain when he does any heavy work. Dr. Ewan, who had been his attending physician for many months, testified to the effect that it was pretty hard to say whether there was anything to cause him pain. Then again he said: "I can see how it would be possible it would cause him some pain to perform heavy labor." Dr. Ewan testified that he examined claimant at different times, but didn't examine him very much after the first nine months; that he was always sensitive, but was not as sensitive at the end of the nine months as at the beginning. Dr. Ewan also testified, "That it was hard to say whether his condition was permanent." On cross-examination this doctor said that the large opening in the external inguinal ring may have been congenital; that he did not know whether the large external ring had always been there or not; that it might have been a large vein that was probably congenital; that his later examinations disclosed that it was not a hernia; that he had given him some medicine for pain; that at the time he advised him to be careful about heavy labor; that the symptoms of pain were purely suggestive; that he did not know at the time that claimant was engaged in cutting and sawing wood; that later, claimant had told him about doing some chopping, getting some wood up. This doctor also testified that he found no

evidence of tearing or lacerations of abdominal wall; that all he found was on the first examination; that the sensitiveness of pain diminished as time went on.

Dr. Harold A. Vonachen and Dr. Harry J. Ireland, both of Peoria, testified and their testimony corroborates a report that they made to the department on August 11, 1936 and on February 19, 1936. Dr. Vonachen, whose principal business is industrial surgery stated that he examined the claimant at the request of the State Department of Public Works and Buildings, Divisions of Highways on August 11, 1936. On cross-examination by claimant's counsel, he testified that he had had many cases similar to claimant's case in industrial work; that he found a slight enlargement of the right inguinal ring, and without the presence of any bulging or impulse through the ring it doesn't signify anything particularly; that he found enlarged external rings in many normal individuals; that his diagnosis showed a right epididymitis; that epididymis is the anatomical term for the junction of the spermatic cord with the testicle, and that was slightly enlarged at the time of his examination, and that would not indicate anything unusual. He stated in his opinion that claimant had been able to work for sometime and thought he should be returning to work, and that opinion was based upon his examination. On cross examination he was asked this question:

Q. But it is true that he could have suffered from pain sufficient to keep him from working and still you couldn't detect it?

He made the following answer:

A. I think if there is sufficient pain there to keep him from work, there has to be some reason for the pain and that ordinarily should be manifested by some objective finding.

He was further asked:

Q. Isn't it true that he could be suffering from pain while exerting himself and still not suffer while in a dormant condition?

A. You mean suffer pain or any pain?

Q. Couldn't he be suffering pain while he worked and still not while he was in your office?

A. A question like that is difficult to answer. In my opinion there was nothing there that would justify sufficient pain to keep him from working.

Q. That isn't what I asked you. Is it possible that he could be suffering from pain when he was under heavy exertion and still not be suffering when he was in your office and there would be nothing to show that he was suffering from pain?

A. I suppose anything is possible but it isn't very probable in this particular case.

Dr. Ireland of Peoria testified and on cross-examination said that his diagnosis at the time of the examination was a previous sacro-iliac strain and a strain of the inguinal muscles and fascia. He had recommended that a scrotal support should be applied and that the man's activities should be increased; that the patient should not necessarily refrain from any heavy lifting or hard labor, but it is usually advisable for a time after the initial injury that there should not be excessive lifting. He also testified that it was possible to have pain without any objective symptoms.

There is no conflict between the testimony of the various doctors.

In the consideration of testimony of medical experts, much credibility cannot be placed thereon when the testimony delves into the realm of conjecture. All an expert can do is to give an opinion based upon a reasonable degree of medical certainty, and laymen cannot be permitted to go this far. There is direct positive evidence in the record, being the evidence of Dr. Vonachen that claimant was able to work and had been able to do so for a long time prior to the date of his report, which was August 11, 1936. Dr. Ewan did not express any opinion contrary to these views.

There is nothing in the record that would justify an award in this case. Therefore, the petition will be denied.

(No. 3306—Claim denied.)

KANSAS CITY FIRE AND MARINE INSURANCE COMPANY, Claimant, vs.
STATE OF ILLINOIS, Respondent.

Opinion filed January 11, 1939.

ECKERT & PETERSON, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE,
Assistant Attorney General, for respondent.

PRIVILEGE TAX—foreign insurance company—voluntary payment of taxes avoided. Where a tax was computed and assessed correctly on the basis of information submitted by claimant, and payment is made thereof, there is no liability upon the part of the State to refund any portion of same, afterward alleged to have been in excess of amount rightfully due, owing to an error made by claimant in furnishing information upon which tax was computed, such payment being voluntary and not due to any mutual mistake of fact.

Mr. Justice LINSCOTT delivered the opinion of the court:

The claimant is an insurance corporation organized under the laws of the State of Missouri, having its principal office at Kansas City in the State of Missouri, and has been duly authorized by the Director of Insurance of the State of Illinois to transact business in the State of Illinois. In accordance with the provisions of Article XXV, Section 409 of the Illinois Insurance Code, effective July 1st, 1937, claimant became liable to pay to the State of Illinois for the privilege of doing an insurance business in the State of Illinois, for the year commencing July 1, 1938, a tax in the amount of two per cent of the gross premiums received by claimant in Illinois during the year ending December 31, 1937 less fire department taxes paid by claimant to the Municipalities within the State of Illinois during the year 1937. The gross premiums received in Illinois during the year ending December 31st, 1937 amounted to \$26,302.35, two per cent of which is \$526.05; but due to an oversight claimant calculated that only \$231.89 had been paid by the claimant in fire department taxes to Municipalities of the State of Illinois during the year 1937, and consequently vouchers were furnished to the Director of Insurance and returned to the claimant on February 28, 1938, along with a letter stating that \$231.89 might be allowed against said tax as set forth above, and the Insurance Department assessed against the claimant the amount of \$294.16 based upon the vouchers of claimant itself.

It is now contended by claimant that in addition to the said \$231.89 of fire department taxes paid during the year 1937, credit for which was given to claimant in said tax assessment, the claimant paid to municipalities of the State of Illinois in fire department taxes for the year 1937, \$164.50 credit for which was not given claimant in said tax bill due to the oversight.

No dispute arises over the facts and counsel for respondent has made a motion to dismiss this case, and that the

claimant be barred from maintaining this action. As grounds for said motion, respondent urges that claimant's complaint does not set forth a claim which the State of Illinois, as a sovereign commonwealth should discharge and pay for the reason that claimant seeks an award predicated upon the liability in the respondent to refund to the claimant a portion of a sum paid to respondent for insurance privilege tax alleged to represent an overpayment of said tax, and the complaint shows upon its face that said alleged overpayment resulted from the claimant's own error in submitting to the Insurance Department information on which the tax was computed and assessed, and that said tax as assessed was paid voluntarily without protest and not under duress.

We have heretofore held that:

"Where a tax voluntarily paid was computed and assessed correctly on the basis of information submitted by the claimant, there is no liability upon the part of the State to refund any portion thereof alleged to have been excessive on account of an error made by the claimant in furnishing the information upon which the tax was computed."

Seith Seiders, Inc. vs. State, 7 C. C. R. 9.

Monarch Fire Insurance Co. vs. State, 9 C. C. R. 638.

For these reasons, the motion of the Attorney General will be sustained. Cause dismissed.

(No. 3310—Claimant awarded \$66.11.)

PUBLIC SERVICE COMPANY OF NORTHERN, ILLINOIS, A CORPORATION.
Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed January 11, 1939.

K. J. OWENS, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

SERVICES AND SUPPLIES—*lapse of appropriation out of which could be paid before payment—when award for will be made.* The facts in this claim are similar to those in *Rock Island Sand & Gravel Co. vs. State*, 8 Court of Claims Reports, page 165, and the opinion in that case is controlling herein.

MR. JUSTICE LINSKOTT delivered the opinion of the court:

In this case the claimant seeks an award in the sum of \$66.11 for the reason that it rendered electrical service to the State of Illinois, Department of Public Works and Buildings,

Division of Highways, at State Aid Route 21, Section 1280, at the grade separation of Dempster Street and Milwaukee Avenue, in or near Morton Grove, Cook County, Illinois; that in connection with the operation of electric pumps for removal of water from the subway and the installation of electric lights it became necessary during the period of service to make a change in meters. Claimant performed this service in July and August, 1936, and rendered its bill for the same in the sum of \$66.11, but through a misunderstanding the district office of the Division of Highways did not schedule claimant's bill for payment in time for it to have been paid from the Fifty-ninth biennium appropriation. The report of the Division of Highways states that the rate upon which the service was based and the claim is made is in accord with the contract then existing between the claimant corporation and the Division of Highways.

This court has repeatedly held that:

"Where claimant has rendered services or furnished supplies to the State on the order or request of an official authorized to contract for the same, and submits a bill therefor within a reasonable time, and due to no neglect or fault on the part of claimant, same is not approved and vouchered for payment before the appropriation from which it is payable lapses, an award for the reasonable and customary value of the services or supplies will be made where at the time the expenditure was contracted there were sufficient funds remaining in the appropriation to pay for the same."

Rock Island Sand & Gravel Co. vs. State, 8 C. C. R. 165;

Indian Motor Cycle Co. vs. State, 9 C. C. R. 527.

No conflict arises as to facts, and it appearing that the services were properly ordered and duly rendered and through no fault of its own, claimant's bill was not paid before the appropriation from which it was payable lapsed, we make an award to claimant in the sum of \$66.11.

(No. 3311—Claimant awarded \$8.65.)

SHELL PETROLEUM CORPORATION, A CORPORATION, Claimant, vs. STATE
OF ILLINOIS, Respondent.

Opinion filed January 11, 1939.

W. W. YEAGER, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MUEHL,
Assistant Attorney General, for respondent.

SUPPLIES—*lapse of appropriation out of which could be paid—before payment when award for may be made.* The facts in this case are almost identical with those in *Rock Island Sand & Gravel Co. vs. State*, 8 Court of Claims Reports, page 165, and the opinion in that case is controlling herein.

MR. JUSTICE LANSFORD delivered the opinion of the court:

In this case, claimant seeks an award in the sum of \$8.65, and the claim is submitted on the claimant's complaint and a report of the Division of Highways. The report was filed as a part of the record pursuant to Rule 21, a copy having first been forwarded to the claimant's attorney.

The facts are that in the month of February and May, 1937, the claimant furnished, pursuant to proper authorization, a total of twenty-five gallons of gasoline and ten gallons of motor oil for the use of the respondent in certain motor vehicles operated by the Division of Highways. The claimant did not submit bills covering these items until after the appropriation for the Fifty-ninth biennium had elapsed, September 30, 1937.

It appears from the department records that this merchandise was actually furnished, and we have repeatedly held that:

"Where claimant has rendered services or furnished supplies to the State on the order or request of an official authorized to contract for the same, and submits a bill therefor within a reasonable time, and due to no neglect or fault on the part of claimant, same is not approved and vouchered for payment before the appropriation from which it is payable lapses, an award for the reasonable and customary value of the services or supplies will be made where at the time the expenditure was contracted there were sufficient funds remaining in the appropriation to pay for same."

Rock Island Sand & Gravel Co. vs. State, 8 C. C. R. 165;

Indian Motor Cycle Co. vs. State, 9 C. C. R. 527.

Therefore, an award will be made in favor of Shell Petroleum Corporation, in the sum of \$8.65.

(No. 3188—Claimant awarded \$75.00.)

H. D. LUDLOW, Claimant, vs. STATE OF ILLINOIS, Respondent.
Opinion filed March 25, 1938.

Award vacated January 11, 1939.

(No. 3214—Claimant awarded \$56.68.)

A-1 TIRE COMPANY, AN ILLINOIS CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 1, 1939.

HAROLD L. EISENSTEIN, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY P. MUNI, Assistant Attorney General, for respondent.

SUPPLIES—*lapse of appropriation out of which could be paid before payment therefor when award may be made for.* The facts in this case are similar to those in *Rock Island Sand & Gravel Co. vs. State*, 8 Court of Claims Reports, page 165, and the opinion in that case is controlling herein.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks an award for Fifty-six and 68/100 (\$56.68) Dollars. The evidence discloses that pursuant to purchase order the claimant, on June 4, 1937, delivered to respondent's Division of Highways certain automobile tires and tubes, the price of which was Fifty-six and 68/100 (\$56.68) Dollars. On July 6, 1937 claimant submitted its bill for said merchandise, but through no fault of claimant, the bill was lost and no warrant was issued in payment of the account prior to the lapse of the appropriation for the 1935-37 biennium on September 30, 1937. The merchandise was regularly purchased and delivered, and payment therefor is legally due.

"Where claimant has rendered services or furnished supplies to the State on the order or request of an official authorized to contract for the same, and submits a bill therefor within a reasonable time, and due to no neglect or fault on the part of claimant, same is not approved and vouchered for payment before the appropriation from which it is payable lapses, an award for the reasonable and customary value of the services or supplies will be made where at the time the expenditure was contracted there were sufficient funds remaining in the appropriation to pay for same."

(*Rock Island Sand & Gravel Co. vs. State*, 8 C. C. R. 165.)

An award is hereby entered in favor of claimant in the sum of Fifty-six and 68/100 (\$56.68) Dollars.

(No. 3195—Claim denied.)

MANDEL BROTHERS, INC., Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 1, 1939.

TAYLOR, MILLER, BUSCH & BOYDEN, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

Contract bid made and accepted constitutes. Where claimant made a bid of \$507.00, as the price for which it would sell merchandise to the State and the State accepts such bid, a binding contract is created between the parties, and upon the delivery of the merchandise and the issuance of the warrant for the price bid, the contract is completely executed and no claim will lie for an amount in excess of the price bid.

SAME—claim for amount in excess of price bid—constitutes claim for extra compensation—allowance of restricted by Section 19 of Article 4 of Constitution of Illinois. The law does not contemplate that bids may be made in one amount and then after having been accepted as the low bid, be increased, and any payment of any amount in excess of the price bid and accepted would constitute extra compensation and is restricted by Article 19 of Section 4 of the Constitution of Illinois.

MR. JUSTICE YANTIS delivered the opinion of the court :

On August 9, 1937 claimant submitted its bid in the sum of Five Hundred Seven (\$507.00) Dollars on certain merchandise to be furnished respondent at the East Moline State Hospital; such bid being made in conformity with all the formalities required by Illinois statute and in accordance with provisions and conditions of a proposal and specification issued by the Division of Purchases and Supplies, Department of Finance of Illinois. Claimant was the bidder. Its bid was accepted and on April 23, 1937 a purchase order was issued for the carpet in question. The latter was delivered to the East Moline State Hospital in due course. On August 10, 1937 the managing officer of said institution requested Mandel Brothers to forward the invoices for such merchandise. On August 24th a further notice was sent by the managing officer to Mandel Brothers, calling their attention to the complaint of August 10th of failure to send invoices, and further notifying claimant that their continued failure to furnish such invoice in triplicate at once would necessitate submitting their bill to the Court of Claims. On September 9, 1937 a third complaint was directed by the managing officer to Mandel Brothers for failure on the latter's part to send an invoice for said merchandise. The rugs in question had previously been shipped in due and regular course. On September 21st the managing officer telegraphed claimant, "Invoices Still Not Received Must Have By Return Mail. Acknowledge Receipt of This Telegram." A copy of such message was for-

warded by mail on the same day. On the following day, September 22nd, Mandel Brothers wired Dr. J. A. Campbell, managing officer of the hospital that they were sending the bills by mail that day. On September 23, 1937 the managing officer acknowledged to Mandel Brothers, receipt of invoices and called their attention to the fact, that the purchase order was for Five Hundred Seven (\$507.00) Dollars and the invoices were billed at Five Hundred Eighty-six and 46/100 (\$586.46) Dollars, further informing claimant that he was changing the amount of the invoice to conform to the order, and that if this was not correct, for Mandel Brothers to contact M. S. Bibb, State Purchasing Agent. The latter promptly instructed Mandel Brothers to amend the price quoted on their purchase order to read Five Hundred Eighty-six and 46/100 (\$586.46) Dollars, which would conform to their bill. In the meantime, i. e. on September 30, 1937, Voucher No. 4718 had cleared from the State Auditor's Office, payable to Mandel Brothers in the sum of Five Hundred Seven (\$507.00) Dollars for the account in question. On October 8th Mandel Brothers notified the State Auditor that they were unable to place this check to the credit of the State because their bill totalled Five Hundred Eighty-six and 46/100 (\$586.46) Dollars. On October 11th the Division of Finance, in answer to an inquiry from the managing officer of the hospital advised the latter that as the appropriations from the 59th General Assembly had lapsed on September 30, 1937, any further action on the Mandel account would go through the Court of Claims. Mandel Brothers were so notified on October 16, 1937, and on February 2, 1938 filed their claim herein for recovery of the sum of Seventy-nine and 46/100 (\$79.46) Dollars balance due on "purchase price amended," of the merchandise in question.

It is admitted by a stipulation on file that claimant has received the sum of Five Hundred Seven (\$507.00) Dollars but has not received the additional amount of Seventy-nine and 46/100 (\$79.46) Dollars which is asked.

The Attorney General's office contends that when claimant's bid of Five Hundred Seven (\$507.00) Dollars was accepted, a binding contract was created between claimant and respondent, and that upon delivery of the goods and the issuance of the warrant for the price bid, the contract was completely executed; that the claimant has been paid the con-

that price and that the payment of any additional amount would violate the constitutional restriction imposed by Section 19 of Article 4, Illinois Constitution of 1870. This provision reads in part as follows:

"The General Assembly shall never grant or authorize extra compensation, fee or allowance to any * * * contractor, after service has been rendered or a contract made, nor authorize the payment of any claim or part thereof, hereafter created against the State under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

The attempted increase of the purchase order was void and there is nothing in the record to support Mr. Bibb's action in attempting to authorize same. Claimant herein contends that as the original contract was authorized by law, the restraint on payment set forth in the constitutional provision above quoted is not applicable. The law does not contemplate that bids may be made in one amount and then after having been accepted as the low bid, be increased and a larger amount paid, in the absence of a proper showing of a law permitting such increase.

We believe the constitutional provision to be applicable in the present case. Claimant cites the case of *Rock Island Sand & Gravel Co. vs. State of Illinois*, 8 C. C. R. 165 and quotes the following:

"Where the facts are undisputed that the State has received supplies as ordered by it and that such supplies were legally bought by the State and that a bill therefor was not presented before the lapse of the appropriation out of which such payment could be made, and further that claimant has not permitted an unreasonable length of time to elapse in so failing to present the bill, an award for the amount due will be made by the Court of Claims. *Shell Petroleum Corp. vs. State*, 7 C. C. R. 224."

One of the essentials in the allowance of claims under the above conditions is as above stated, "that claimant has not permitted an unreasonable length of time to elapse in presenting its bill." In the present case the record discloses that it was only after repeated requests by letter and telegram that respondent was able to obtain a bill for the merchandise in question. Had claimant not ignored such requests it might have obtained an adjustment of its account before the appropriations of the 1935-37 biennium lapsed. As to that, we cannot say, but as the matter now stands before this court, no award can be legally made. Award denied and claim dismissed.

(No. 2611—Claim denied.)

WILLIAM J. PENTOSKEY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 1, 1939.

WM. MARTIN GARVEY, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

EQUITY AND GOOD CONSCIENCE—*when award on grounds of must be denied.* Where claimant, a guard employed at Illinois State Penitentiary makes claim for compensation for personal injuries alleged to have been sustained, while in performance of his duties, as a result of being attacked by prisoners attempting to escape, on the grounds of equity and good conscience, an award must be denied, no showing being made that claimant comes within provisions of any law making the State liable to him, for compensation for such injuries and claimant cannot invoke principal of equity to secure award.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant, William K. Pentoskey, was a guard at the Illinois State Penitentiary at Stateville, Illinois. On September 10, 1934 while performing his usual duties as a guard claimant was seized by three inmates who were attempting to escape. In the struggle one of such inmates cut one of claimant's nostrils with a knife and he received a bullet wound in the right forearm, also a stab wound on the left side of the chest and two other cuts in his back. The complaint alleges that the knife wound in plaintiff's nostril left a scar about one-half inch in length, but there is no evidence in the record in support of this. The complaint does not specifically seek an award under the Workmen's Compensation Act for either temporary total, partial permanent or specific disability, but seeks an allowance of his claim for Ten Thousand (\$10,000.00) Dollars in equity and good conscience for pain suffering and physical difficulties in performing his duties subsequent to said attack. There is no bill of particulars attached to the complaint and the latter is not sworn to as required under the rules of court.

The record herein discloses that claimant on the occasion in question apparently conducted himself in a gallant and brave manner. It further discloses that his injuries incapacitated him for twenty (20) days, during which time he was paid his full salary. That thereafter he returned to work and continued to work up to the time of the taking of the

testimony. On March 22, 1937 he was ordered transferred to the Menard Branch of the Penitentiary, but failed to report for duty at that Institution, and according to the official record is no longer employed by the State. There is nothing in the record upon which to grant an award for temporary total disability or for disfigurement or for specific loss. As to total permanent disability, the evidence shows that he returned to his employment at the end of twenty (20) days after the accident and continued therein as above stated to the time of the taking of the testimony. According to his testimony there was no change in his work since the date of his injury, and his discontinuance of such work thereafter was apparently voluntary upon his part, as he was notified to report for duty at Menard and failed to do so. The only evidence that would tend toward authorizing any partial permanent disability award is that of Dr. Frank A. Chmelik, a Doctor at the State Penitentiary, who testified that after an experience such as claimant had a fear is apt to develop in such person causing him to be of a nervous strain.

Dr. Emil J. Viscocil testified that he had made one examination of claimant about a week prior to the taking of evidence in the case, and that he found the claimant to be suffering from an umbilical hernia and a left sacro-illiac sprain and of a nervous disposition. That such condition was apparently caused by an injury, and that such condition had the appearance of not having originated in the past few months. That the direct result of all of his condition would be one of nervousness.

No award in the nature of a reward for claimant's conduct can be made by the court. The rule has repeatedly been announced that,

"Before a claimant can have an award against the State, he must show that he comes within the provision of some law making the State liable to him for the amount claimed. If he cannot point to some law giving him the right to an award he cannot invoke the principal of equity to secure such award."

England vs. State, 9 C. C. R. 59.

Cribtree vs. State, 7 C. C. R. 207.

As no sufficient proof appears in the record upon which an award could be based, the claim is hereby denied and the same is dismissed.

(No. 2922—Claimant awarded \$3,100.00.)

OLGA SCHOBERT, WIDOW, AND ELMER AND GEORGE JOHN SCHOBERT, JR.,
DEPENDENT MINOR CHILDREN OF GEORGE JOHN SCHOBERT, DE-
CEASED, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 8, 1939.

JOSEPH E. FLEMING, for claimants.

OTTO KERNER, Attorney General; GLENN A. TRIVOR,
Assistant Attorney General, for respondent.

*WORKMEN'S COMPENSATION ACT when award for compensation for death
may be made under.* Where it appears that employee of State sustains acci-
dental injuries, resulting in his death, arising out of and in the course of his
employment, while engaged in extra hazardous employment, an award for
compensation may be made to those entitled, in accordance with the provi-
sions of the Act, upon compliance with the terms thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant Olga Schobert is the surviving widow, and Elmer Schobert and George John Schobert, Jr., are the chil-
dren of George John Schobert, deceased. The latter, accord-
ing to a stipulation filed herein, was an employee of the Divi-
sion of Highways of Illinois, and on the 26th day of June,
A. D. 1935 was working as a patrolman's helper repairing the
"Belleville-Shiloh Road." A severe rain had washed a heavy
film of clay soil onto the pavement, and when the truck which
Mr. Schobert was driving struck same it became unmanage-
able and ran off the road, turned over and Mr. Schobert was
thrown to the ground and the truck wheels crushed his chest,
so that he died before arriving at the hospital within thirty
minutes after the accident.

From the record filed herein the court finds that George
John Schobert and the respondent were, on the 26th day of
June, 1935, both operating under the provisions of the Work-
men's Compensation Act; that on said date the former sus-
tained accidental injuries which arose out of and in the course
of his employment, and which resulted in his death; that
respondent had immediate notice of such accident, and claim
for compensation was made within the time required by the
provisions of said Act; that said employee had been regu-
larly employed by respondent for more than one year prior
to said accident, and his earnings during that time were Six
Hundred Fifty-four and 55/100 (\$654.55) Dollars, and his

average weekly wage was Thirteen and 28/100 (\$13.28) Dollars; that necessary first aid, surgical and hospital services were rendered, which bills remain unpaid, i. e.

| | |
|---|----------------|
| Gundlach & Co., Funeral Directors, Belleville, Ambulance charge | \$5.00 |
| St. Elizabeth Hospital, Belleville..... | 1.00 |
| Dr. August F. Bechtold, Belleville..... | 5.00 |
| Total | \$11.00 |

Further, that said George John Schobert left surviving, his widow, Olga Schobert, and his two children, Elmer Schobert, aged fourteen years, and George John Schobert, Jr., aged eight years at the time of their father's death, both of whom were totally dependent upon the earnings of their father for support and maintenance.

The amount of compensation to be paid by respondent herein, under the provisions of Sections 7 (a) and 7 (b) 1 is found to be Three Thousand One Hundred (\$3,100.00) Dollars; said compensation having been due in weekly installments of Twelve (\$12.00) Dollars per week, commencing June 26, 1935; further that the share or portion of such compensation as would otherwise be payable to each of said children above named, should be paid to their mother for the support of said children; that the said Olga Schobert is now entitled to have and to receive from respondent such amount of compensation as has accrued from June 26, 1935 to February 9, 1938, and to monthly payments of the balance as hereinafter provided.

It is **THEREFORE ORDERED** that the share of compensation payments which otherwise would be payable to said Elmer Schobert and George John Schobert, Jr., shall be paid to their mother, Olga Schobert, for the support of the said Elmer Schobert and George John Schobert, Jr.

It is **FURTHER ORDERED** that an award be entered herein in favor of the claimant Olga Schobert for the sum of Three Thousand One Hundred (\$3,100.00) Dollars; such award to be payable as follows, i. e.:

The sum of One Thousand Six Hundred Forty-four (\$1,644.00) Dollars to be paid forthwith, this being the amount of compensation which has accrued from June 26, 1935 to February 10, 1938.

The balance of such award shall be payable from month to month in weekly installments of Twelve (\$12.00) Dollars per week for one hundred twenty (120) weeks and one final payment of Sixteen (\$16.00) Dollars.

IT IS FURTHER ORDERED that there shall be paid to —
Olga Schubert

| | |
|--|---------|
| For Gundlach & Co., Belleville, Ill. Ambulance Charge..... | \$5.00 |
| For St. Elizabeth Hospital, Belleville. | 1.00 |
| For Dr. August F. Bechtold, Belleville. | 5.00 |
| Total | \$11.00 |

The foregoing award being made under the provisions of the Workmen's Compensation Act for the death of a State employee, is subject to the provisions of an Act entitled "An Act Making an Appropriation to Pay Claims Arising Out of Injuries to State Employees and Providing for the Method of Payment Thereof," approved July 3, 1937, (Sess. Laws of 1937, p. 83).

In accordance with the provisions of such Act, this award is subject to the approval of the Governor, and upon such approval is payable from the appropriation from the "Road Fund" in the manner provided in such Act.

(No. 2897—Claim denied.)

HERBERT ROMMELL, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 14, 1939.

IMMENHAUSEN & BANOVITZ, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

ILLINOIS NATIONAL GUARD—*personal injury sustained by member of—must be incurred while in performance of duties in order to obtain compensation for—when award for denied.* Where claimant, a member of the Illinois National Guard, claims compensation for personal injuries, alleged to have been sustained while in the performance of his duties as such member, and at the request of claimant a Military Line-of-Duty Board was appointed, pursuant to Military Regulations, which after hearing found that the injuries alleged to have been sustained by claimant were not incurred while in the performance of his duties, as such member, the court is justified in denying an award.

SAME—*same—when claim for hospital charges must be denied.* In claim by member of Illinois National Guard for medical and hospital charges incurred as a result of personal injuries, State can only be held liable where injuries are shown to have been sustained while claimant was engaged in the performance of his duties, and on proper vouchers made out by the attending medical officer, approved by the surgeon general.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant was formerly a member of the Illinois National Guard and seeks an award of One Thousand Four Hundred Fifteen and 60/100 (\$1415.60) Dollars, claiming that on August 6, 1935 he was stationed at Camp Grant, Rockford, Illinois, as Captain of Company G of the 132nd Infantry; and that on said date he received injuries while in the line of duty which resulted in loss of time and hospitalization after he returned to his home in Chicago, following the encampment.

The claim comes before the court on claimant's complaint, a report made by the Adjutant General's office, a transcript of the testimony, and the respective briefs of the parties. From a consideration of the record it appears that there was a lot of crushed stone around the front of claimant's tent at Camp Grant. He testified that he had returned from the drill field on the day in question, and that in going into his tent he turned an ankle and upon trying to regain his balance stubbed his toe on the tent flooring which was about four inches above the ground, and crashed against the side of his metal cot striking his ribs on the right side and his lip; that he went over to the medical tent and they plastered up his lip; that the next morning he had severe pain in the right chest, and he again went over to the medical tent and "they taped his side." Claimant further testified that pain increased and he returned to the medical tent three or four times during the camp period, and they readjusted the tape.

That during the camp they went out on bivouac duty and had to sleep on the ground, which was damp with dew; that in the maneuvers it is necessary to run, lie down, get up and run again, etc., and that he reported to an officer in charge that he was unable to do that, so the latter pinned a tag on him which relieved him from such activity. The tag in question is dated "August 13, 1935 5 A. M. bivouac area. Diagnosis: Fracture ribs 8 & 9 right. Treatment: Adhesive strapping. Disposition: Duty. Signature: Johnson, 1st. Lt." Claimant remained in camp until August 17th. After he returned to Chicago he reported to Lieutenant Johnson who instructed him to see Major Weil; that he was unable to find Major Weil, so he went of his own accord to the Northern Hospital at 2314 North Clark Street, operated by Dr. Doyle, where he remained from August 21, 1935 to September 28,

1935. He seeks payment for alleged expense incurred in such treatment at the rate of \$5.00 per day for thirty-nine (39) days for room, board and nursing, One Hundred Ninety-five (\$195.00) Dollars and for fourteen (14) days special nurse hire at the hospital at the rate of \$8.00 per day, One Hundred Twelve (\$112.00) Dollars, with additional laboratory, X-ray and medical charges, making a total hospital bill of Three Hundred Eighty-one (\$381.00) Dollars, and a personal bill for services of Dr. Doyle of Five Hundred Fifty-three (\$553.00) Dollars. In addition to seeking payment of these bills he asks for an award for lost earnings during the period from August 18th to September 30, 1935. His pay as a captain in the National Guard was Three Hundred Fifty (\$350.00) Dollars per month while in active service. His civilian wages as a mail carrier were One Hundred Seventy-five (\$175.00) Dollars per month.

At claimant's request a Military Line-of-Duty Board was appointed pursuant to National Guard regulations, to consider his illness. Such appointment was made on June 1, 1935 and the board convened on December 20th at the 132nd Infantry Armory in Chicago to investigate the reported sickness of Captain Rommel. A transcript of such hearing discloses the following questions and answers: (By Major Weil and Capt. Rommel respectively).

"Q. When did you first become ill?

"A. I awakened Wednesday morning, August 7, 1935 with pain in right chest. * * *

"Q. Were any X-rays taken after your admittance to the Northern Hospital?

"A. No.

"Q. Were any efforts made to get in touch with a Regimental Medical Officer prior to your admittance to the hospital?

"A. No."

This and other testimony before the medical board is not in accord with other testimony appearing in the record. Neither does it support a charge of \$10.00 for X-ray shown in Dr. Doyle's bill from the Northern Hospital.

Awards that are made to those in military service for injuries alleged to have been incurred in such service are made under and by virtue of the provisions of Chapter 129, Illinois Revised Statutes, known as the Military and Naval Code. Section 142 of such Act provides as follows:

(Compensation when wounded in service.)

"Any officer or enlisted man of the National Guard or Naval Reserve who may be wounded or disabled in any way, while on duty and lawfully performing same, so as to prevent his working at his profession, trade or other occupation from which he gains his living, shall be entitled to be treated by an officer of the medical department detailed by the surgeon general, and to draw one-half his active service pay, as specified in Sections 3 and 4 of this article, for not to exceed thirty days of such disability, on the certificate of the attending medical officer; if still disabled at the end of thirty days, he shall be entitled to draw pay at the same rate for such period as a board of three medical officers, duly convened by order of the Commander-in-Chief, may determine to be right and just, but not to exceed six months, unless approved by the State Court of Claims."

Section 143 of such Act has the further provision:

"(When killed or wounded in service—claim against State.)

"In every case where an officer or enlisted man of the National Guard or Naval Reserve shall be injured, wounded or killed while performing his duty as an officer or enlisted man in pursuance of orders from the Commander-in-Chief, said officer or enlisted man, or his heirs or dependents, shall have a claim against the State for financial help or assistance, and the State Court of Claims shall act on and adjust the same as the merits of each case may demand. Pending action of the Court of Claims, the Commander-in-Chief is authorized to relieve emergency needs upon recommendation of a board of three officers, one of whom shall be an officer of the medical department."

In the present case the record shows that the Line-of-Duty Military Board which considered Captain Rommel's case, returned the following findings:

"1. Captain Rommel was not on sick report at any time during the Field Training Period, August 3rd to August 17th, 1935.

"2. Captain Rommel was able to discharge his regular and required duties during this entire Field Training Period.

"3. Following the return to home station, Captain Rommel did not report for medical attention to any of the Regimental Medical Officers.

"4. Captain Rommel's statements and the affidavits of Major Weil and Lieutenant Johnson do not agree as to the cause of alleged disability at Camp Grant.

"**THEREFORE:** This Board concludes that line of duty status was not established and that hospitalization during the Field Training Period was not required, and finds no evidence has been submitted to connect the disability of Captain Rommel during the Field Training at Camp Grant, Illinois, August 3rd to 17th, 1935, with his alleged subsequent illness and hospitalization after return to home station."

The statutory provisions above cited both contemplate that injuries suffered by those in the National Guard or Naval Reserve, to be compensable must have been incurred while in the line of duty. The Military Board appointed in the present case has found that "line of duty" status was not

established. This court is not inclined, under the record before us, to go back of the finding made by such Military Board upon the point of the military service in question. In the absence of a finding that claimant's injuries were incurred in the line of duty or while performing his duty under orders from his commander-in-chief, no award is justified by this court upon the claim in question.

Section 145 of the Military and Naval Code contains a further provision, i. e.:

"(Hospital charges.)

"Necessary hospital charges incurred in cases stated in Sections 10 and 11, and for beds in open or general wards, shall be paid by the State on proper vouchers made out by the attending medical officer, approved by the Surgeon General."

The services obtained by claimant from Dr. Doyle at the Northern Hospital do not come within either of the above sections, and no vouchers have been produced from the attending medical officer, approved by the Surgeon General, and no basis for payment by the State for either the hospital bill or Dr. Doyle's bill is shown.

Claimant cites the case of *Paul H. Boyers vs. State, C. C. R. 9, 530*. Inspection of that case will disclose that a medical board there convened returned a finding that Private Boyer's injury was incurred "in line of duty."

No legal basis appearing for an award in the present case, same is denied and the claim dismissed.

(No. 3133—Claim denied.)

NELLIE MCKEE, WIDOW OF WALTER MCKEE, DECEASED, Claimant, vs.
STATE OF ILLINOIS, Respondent.

Opinion filed February 14, 1939.

JOHN W. FRIBLEY, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—claim for compensation for death under must be shown injury arose out of and in the course of employment. In order to obtain an award for compensation under Act, it must be shown that claimant sustained accidental injuries, not only arising out of but in the course of his employment, while engaged in extra hazardous enterprise, and if it be shown that injuries arose out of but not in the course of employment, claim must fail.

SAME—same—when not shown that death is result of accidental injury arising out of employment. Where it appears that employee, who a year before his death was afflicted with cerebral hemorrhage, while in private employment, was employed with highway maintenance patrolman, his duty at the time consisting of holding flag to direct traffic and protect patrolman, suddenly began to bleed from nose and mouth and dies shortly after, there is no causal relation shown between his employment and death, nor any showing that his death is the result of any accidental injury arising out of his employment.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On several occasions prior to July 1st, 1937, one Walter McKee was employed by the Division of Highways of the Department of Public Works and Buildings of the respondent. On the last mentioned date he was working with the maintenance patrolman in District No. 7, and was engaged in repairing the State highway designated as U. S. No. 40, at a point approximately two miles east of the City of Vandalia.

On said 1st day of July, McKee and the maintenance patrolman were engaged in the work of "cutting expansion joints," which work consisted of cutting the asphalt which raised above the level of the concrete, at the various expansion joints, as the result of the expansion of the concrete slab on account of the heat. The work of cutting was done with a scraper (an instrument similar to a straightened-out hoe) with a wire attached to the lower part of the blade. In using this instrument the patrolman pulled on the wire, and McKee pushed on the handle. They continued cutting expansion joints until noon, at which time they drove to a small shed where their supplies were kept, and ate their lunch. After lunch, to wit, at one o'clock P. M., and before leaving the shed, they loaded their truck with fine crushed rock, and a barrel containing asphalt, having a total weight of from 150 to 200 pounds. In loading such barrel, one man was on each side, and they lifted or tipped it into the truck, the box being four feet above the ground. The evidence indicates that the work of cutting expansion joints was more strenuous than the work of lifting the barrel onto the truck.

After loading the truck, they drove out on the highway and commenced repairing holes in the pavement. The truck was left on the highway, and the patrolman did the repair work just in front of it, while McKee stood behind the truck

with a flag, for the purpose of directing the traffic and thereby protecting the patrolman. After they had been working about fifteen minutes, being between two and three o'clock P. M., and while the patrolman was engaged in repairing a hole in the pavement, he heard McKee cough twice, and looking up, saw that McKee was bleeding from the mouth and nose. He immediately placed him on the truck and started for Vandalia. The bleeding continued and the patrolman stopped at a station and called for an ambulance. As soon as the ambulance arrived, McKee was placed therein, but died before he reached the hospital.

The evidence discloses that on July 7, 1936 (approximately one year prior to his death) McKee sustained a heat stroke while working for a private construction company engaged in the construction of buildings at the Vandalia Penal Farm. Dr. A. R. Stanbury of Vandalia attended him at that time and diagnosed McKee's condition as "cerebral hemorrhage causing a pressure on the vocal cord and causing the inability of the vocal cord to act." Prior to that time McKee had been a very stout man, and in good health. After the heat stroke, however, he did not recover his former condition, was subject to spells of coughing, and could hardly speak above a whisper.

McKee was a married man, and his widow, Nellie McKee, is the claimant in this proceeding. She contends that the exertion of lifting the barrel containing asphalt into the truck was the cause of the death of her husband; that the injury arose out of and in the course of his employment; and that she is entitled to the compensation provided by the terms and provisions of the Workmen's Compensation Act of this State.

The respondent contends that there was no causal connection between McKee's employment and his death; that he did not die as the result of an accidental injury which arose out of his employment; and that there is no liability on the part of the State for his death.

The only medical evidence in the case is the testimony of Dr. Stanbury who treated McKee at the time of his heat stroke on July 7, 1936, and for some time thereafter. Dr. Stanbury, however, stated that he had not treated McKee at any time within six months prior to his death, and made no examination of the body at the time of death. The evidence discloses that no post mortem examination was made, and no autopsy was performed.

Claimant's case rests almost entirely upon the testimony of Dr. A. R. Stanbury who stated that, in his opinion, the sun-stroke "paralyzed some of the upper part of the bronchial tube and the lungs" and also gave it as his opinion that such paralysis caused an aneurism of the arteries of the upper part of the lung; that the hemorrhage sustained on July 1st, 1937 was caused from the aneurism in the upper part of the lung.

Dr. Stanbury on direct examination was asked the following question: "Doctor Stanbury, based upon your own knowledge of the conditions of Walter McKee which you observed in your treatment of him during the year before he died, based upon your knowledge of medicine and your practice of medicine and surgery over a period of twenty-eight years, and based upon the testimony of Curt Kile which you have listened to, who was the witness who immediately preceded you, and upon the stated fact that Walter McKee had during the morning of the date of his death been engaged in cutting asphalt from expansion joints in the hard road during which period of time he used a scraper holding it by a handle before him, pushing against this handle with his hands and chest, and upon the fact that he immediately prior to his death had lifted a barrel of asphalt weighing one hundred and fifty to two hundred pounds, have you an opinion based upon a reasonable degree of medical certainty as to what caused the death of Walter McKee?";—to which question he replied that he had an opinion and expressed such opinion as follows: "My opinion is that this exertion kept thinning the aneurism down until there was no more protection and with just a little exertion it might burst it, which caused his death."

The question propounded to Dr. Stanbury was apparently intended to be, but was not, a hypothetical question. Furthermore, it was based in part, upon the doctor's knowledge of the condition of Walter McKee which he observed in his treatment of him during the year before he died, but the doctor had previously stated that he had not examined McKee for six months prior to his death, and did not examine him at the time of his death, nor did he make a post-mortem or perform an autopsy.

Dr. Stanbury's opinion was also based in part, upon the hypothesis that in cutting the asphalt from expansion joints, McKee was holding the scraper by the handle, pushing against

such handle with his hands and with his chest, and upon the further hypothesis that immediately prior to his death McKee had lifted a barrel of asphalt weighing 150 to 200 pounds. There is no evidence in the record whatsoever that the handle of the scraper at any time came in contact with McKee's chest, and the testimony with reference to lifting the barrel of asphalt was that such barrel was lifted by the maintenance man and McKee jointly, and that the time of such lifting was at least an hour prior to the time of the hemorrhage.

In his cross-examination, Dr. Stanbury was asked (Transcript page 34): "So your opinion as to the cause of death is more or less based upon the evidence of what occurred at that time?";—to which he replied: "The history of the case and other cases similar of that type, that is the only thing that I have. I wouldn't say that that is correct, but it is my opinion."

Although Dr. Stanbury was the McKee family physician, yet he could not properly be called the treating physician of Mr. McKee, as he had not treated him for at least six months prior to the time of the hemorrhage, and did not make an examination of him at or after the time of the hemorrhage. Not being the treating physician, his opinion, based in part upon the history of the case, was not competent evidence. *Wells Bros. Co. vs. Ind. Com.*, 306 Ill. 191; *Lehigh Stone Co. vs. Ind. Com.*, 315 Ill. 431; *Powers Storage Co. vs. Ind. Com.*, 340 Ill. 498.

Furthermore, he did not qualify, or attempt to qualify, as an expert witness.

Considered from any angle, the opinion of Dr. Stanbury does not constitute the basis for an award.

Our Supreme Court has held in numerous cases that in proceedings under the Workmen's Compensation Act, the rules respecting the admission of evidence and the burden of proof are the same as those that prevail in common law actions for personal injury. *Chicago Daily News Co. vs. Ind. Com.*, 306 Ill. 212; *Kivish vs. Ind. Com.*, 312 Ill. 311; *Atlas Brewing Co. vs. Ind. Com.*, 314 Ill. 196-200; *Mehay vs. Ind. Com.*, 316 Ill. 97-102.

Such court has also held in numerous cases that liability under the Workmen's Compensation Act cannot rest upon imagination, speculation, or conjecture, or upon a choice between two views each compatible with the evidence, but must

be based upon facts established by a preponderance of the evidence; and there can be no award where death ensues from a pre-existing disease and not from an injury. *Berry vs. Ind. Com.*, 335 Ill. 374-377; *Conreaur vs. Ind. Com.*, 354 Ill. 356; *Harding Co. vs. Ind. Com.*, 355 Ill. 139-144; *Sanitary District vs. Ind. Com.*, 343 Ill. 236-242.

The question as to the proper meaning of the words "arising out of" and "in the course of," has come before the courts in numerous cases. In *McNicol's Case*, 215 Mass. 487, the Supreme Court of Massachusetts said:

"An injury arises 'out of the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a casual connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person, familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises out of the employment, but it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence."

This definition has been approved by our Supreme Court in numerous cases. *Central Illinois Service Co. vs. Ind. Com.*, 291 Ill. 256; *Vincennes Bridge Co. vs. Ind. Com.*, 351 Ill. 444; *Mazursky vs. Ind. Com.*, 364 Ill. 445.

The difficulty in this case lies not so much with the principles of law involved, as with the application of the facts to such principles.

In the case of *American Steel Foundries Co. vs. Ind. Com.*, 327 Ill. 615, an employee named Cochran was operating an electric crane in the foundry of the respondent. The crane was operated from a cage about ten feet above the floor and about eighteen or twenty feet from the furnaces. The operator's duty was to move a controller, which was similar to the controller of a street car, and was operated about as easily. While operating the crane a sharp pain struck the employee in his right arm. He testified that before the pain struck him the fumes from the furnaces made his lungs burn.

There was no question but what defendant's lung col-

lapsed, and the only question in the case was whether such collapse was the result of gases escaping from the furnace or whether it resulted from some other cause. There was medical testimony to the effect that the collapse of the lung was the result of a tubercular condition of the hilus gland, which ate a small hole through the parietal pleura, permitting the entry of air into the lung covering.

After considering the testimony the court said:

"It is apparent that the evidence not only did not show that the disability resulted from an accidental injury arising out of and in the course of Cochran's work, but the contrary. * * *

"Here there was no evidence that Cochran suffered an accidental injury which arose out of and in the course of his employment except the fact of his disability occurring while he was at work, and the cause of his disability was clearly shown to have been not an accidental injury but a tubercular condition which permitted the access of air to the space between the visceral and the parietal pleura";—

and reversed the decision of the Industrial Commission and the decision of the Circuit Court allowing an award.

Numerous other cases of a similar nature have come before our Supreme Court, but a complete review thereof would serve no useful purpose, as each case is based upon its own peculiar facts, and a brief reference to a few of such cases will suffice.

The case of *New Staunton Coal Co. vs. Ind. Com.*, 307 Ill. 408, involved a miner who was stricken while shoveling coal into a car; the case of *Selz-Schwab & Co. vs. Ind. Com.*, 326 Ill. 120, involved a worker in the stock room who was stricken while in the performance of the usual duties of his employment; the case of *Hahn vs. Ind. Com.*, 337 Ill. 59, involved a pipe fitter who fell from a ladder on which he was standing, while engaged in cutting a groove in a post; the case of *Jolly vs. Ind. Com.*, 341 Ill. 46, involved a hotel employee who became sick while engaged in the performance of her usual duties in the kitchen. A physician was summoned and found that she was suffering from a strangulated hernia. An operation was performed the same day, and she died a few days later.

The case of *Cruzan vs. Ind. Com.*, 350 Ill. 407, involved an employee who died from the effects of peritonitis following perforation of the duodenum due to duodenal ulcers, the perforation occurring while the employee, in the performance of his duties, was stooping down to pick up a toy trunk;—and

in each of such cases the Supreme Court held in substance that the plaintiff had failed to establish a causal connection between the accident and the death; had failed to prove an accidental injury arising out of the employment;—and denied an award. In the last mentioned case, the court said:

"There must be some cause or (causal?) relation between the injury and the employment, and if the injury is sustained by reason of some cause having no relation to the employment it does not arise out of the employment. It is not enough that the injured person may be present at the place of the accident because of his work unless the injury is the result of some risk of the employment.

* * * * *

"One claiming compensation under the Compensation Act for the death of an employee must prove by direct and positive evidence, or by evidence from which the inference can fairly and reasonably be drawn, that death was caused by an accidental injury which occurred not only in the course of the employment of the deceased but also arose out of such employment. While compensation may be awarded even though there is a pre-existing disease, if the disease is exaggerated or accelerated by an accidental injury the accidental injury must be the immediate or proximate cause of death."

The facts in the present case show that at no time prior to the hemorrhage did McKee complain to the patrolman with reference to the work, or with reference to his own physical condition; that the work of cutting expansion joints was more strenuous than the work of lifting the barrel into the truck; that the work of cutting expansion joints occupied the entire morning, and the lifting of the barrel into the truck was done at least one hour prior to the time the decedent sustained the hemorrhage; that McKee did not undergo any exertion of any kind from the time the barrel of asphalt was loaded into the truck until he started coughing just prior to the hemorrhage, aside from the ordinary work of getting on and off the truck and standing on the pavement holding a flag.

Dr. Stanbury stated that in his opinion the aneurism was located in the upper part of the left lung. He was then asked the following question: "If there were an aneurism in the upper part of the left lung, how long an interval would there be between the bursting of such aneurism and the expulsion of blood through the mouth?";—to which he replied, "Immediately." He also stated that the bursting of an aneurism might occur to a man wandering down the street; that it might result from almost an imperceptible amount of exertion; that it could be caused by mental excitement or nervous strain, by jumping off a wagon, or a sudden jar.

If the exertion connected with the work of lifting the barrel of asphalt into the truck was the cause of the hemorrhage, it would seem, under the testimony of Dr. Stanbury, that death would have resulted almost immediately thereafter. The fact that the hemorrhage did not result for more than an hour after the asphalt was loaded into the truck, would tend to prove that the exertion in loading such asphalt was not the cause of the hemorrhage.

From all of the competent evidence in the record, we are of the opinion that the claimant has failed to establish that the death of Mr. McKee was the result of an accidental injury arising out of his employment, and award must therefore be denied.

(No. 3263—Claimant awarded \$103.74.)

GOODYEAR SERVICE, RETAIL DIVISION OF THE GOODYEAR TIRE & RUBBER
COMPANY, INC., Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 14, 1939.

Claimant, pro se.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE,
Assistant Attorney General, for respondent.

SUPPLIES—*lapse of appropriation out of which could be paid—before payment—when award may be made for.* The facts in this claim are similar to those in the case of *Metropolitan Electrical Supply Company vs. State*, No. 3270, *supra*, and the opinion in that case is controlling herein.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On June 3, 1935, pursuant to State Purchase Order No. BO 7652, the claimant delivered to respondent at Chicago State Hospital, Dunning, Illinois, two 40x6 notched A. W. R. tractor type casings, of the value of \$103.74.

Claimant alleges that a bill for such merchandise was presented to the respondent, but if presented, it was overlooked or mislaid, as the record shows that on September 6, 1935 respondent requested claimant to furnish triplicate invoices covering the merchandise in question. However, such invoices were not received until after the lapse of the appropriation out of which the same were payable. At the time the purchase order was issued, and at the time the merchandise

was received by the respondent, there remained in the appropriate fund a sufficient unexpended balance to pay for the same.

We have repeatedly held that where materials or supplies have been properly furnished to the State, and a bill therefor has been submitted within a reasonable time, but the same was not approved and vouchered for payment before the lapse of the appropriation from which it is payable, without any fault or neglect on the part of the claimant, an award for the reasonable value of such materials or supplies will be made, where, at the time the expenses were incurred there were sufficient funds remaining unexpended in the appropriation to pay for the same. *Rock Island Sand & Gravel Co. vs. State*, 8 C. C. R. 165; *Indian Motorcycle Co. vs. State*, 9 C. C. R. 526; *Goodyear Tire & Rubber Co. vs. State*, No. 3155, decided at the March Term, 1938, of this court; *Metropolitan Electrical Supply Co. vs. State*, No. 3270, decided at the September Term, 1938, of this court.

This case comes within the rule above set forth, and award is therefore entered in favor of the claimant for the sum of \$103.74.

(No. 2985—Claimant awarded \$2,452.00.)

J. BINNIE WOLFE, ADMINISTRATOR OF THE ESTATE OF CHARLES R. MILLER, DECEASED, AND EDITH MILLER, SUBSTITUTED CLAIMANT. Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 14, 1939.

ROSWELL B. O'HARRA and JOHN L. FISHER, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—claim for death under—disease existing prior to accident—exaggerated or accelerated by injury—when award may be made. If it appears that the death of an employee is fairly chargeable to an accident, arising out of and in the course of his employment, while engaged in extra hazardous employment, as an efficient cause, compensation for such death may be made in accordance with Act, although employee was afflicted with disease prior to accident, provided disease was exaggerated or accelerated by the injury resulting from accident, and there must be a direct relation between the accident and the subsequent death.

MR. JUSTICE YANTIS delivered the opinion of the court:

The original claim herein was filed by Charlie R. Miller on September 23, 1936, alleging that while working as a laborer in the Highway Division of the Department of Public Works and Buildings, on September 25, 1935 on S. B. I. Route No. 9 in McDonough County, he suffered accidental injuries which resulted in loss of time and disability which necessitated an operation for the removal of a tumor and the right testicle. Claimant sought an award of Six Thousand (\$6,000.00) Dollars for temporary and partial permanent disability. On December 4, 1936 Roswell B. O'Harra as attorney for claimant filed a report of the death of claimant.

Leave of court being first had and obtained on March 9, 1937, J. Binnie Wolfe, administrator of the estate of Charlie R. Miller and Edith Miller, surviving widow of decedent, filed herein their amended and supplemental complaint.

The case comes before the court upon the foregoing and the transcript of evidence and the written briefs of the respective parties filed herein, together with a report by Theo. Plack, District Engineer for the Division of Highways, filed herein on July 13, 1938.

From the record it appears that Charlie R. Miller was working with one Sherman Adair cleaning ditches along the highway on September 25, 1935; that they had a piece of sod about five feet long two feet wide and six inches thick which they were attempting to lift with their shovels from the ditch onto a truck; that when they had the sod almost to the top of the truck Adair's shovel slipped and the entire weight of the sod was thrown upon Miller.

Adair testified that Miller immediately complained of having hurt his back or side; that "he seemed in quite intense pain—he seemed to have quite a bit of pain at once." This happened in the afternoon and they continued to work that afternoon.

His wife, Edith Miller, testified that the next day it rained and no work was attempted; that he went back to work the following day and worked for the next three days until that particular job was finished, and that he did not work from that time until his death. She further testified that he was in apparent pain all the time, that the right testicle began to swell and that there was no apparent bruise but there

was a redness on the testicle. He went to Dr. B. A. Harrison at Colchester on October 7, 1935. The patient was treated by the latter and the doctor attempted to diagnose his trouble. In December he was taken to Dr. Arp at Moline. The latter's examination pronounced his condition to be the result of a strain, and the Doctor instructed him to continue under the care of Dr. Harrison. In January he and another man attempted to open up a coal mine but he was only able to work one morning. He then went to a Dr. Dillon whose only treatment was to give him something to relieve the pain from which he was suffering. At Dr. Harrison's request Mrs. Miller took her husband to a hospital at Iowa City. X-ray pictures and blood tests were taken and an operation was performed and the right testicle which was found to be a malignant tumor was removed. He was then removed to his home where he died three weeks later, on October 9, 1936.

The deceased was in apparent good health and physical condition prior to the day of his accident. His wife testified that he had never been sick from the time they were married in June, 1929, and had never had any injury that she knew of prior to that on September 25, 1935. Sherman Adair testified that he had known the deceased for approximately a year and a half before the accident, and had worked with him on the hard road for some time prior to that date; that they were working in the same gang and that Miller was in apparent good health and possessed of ordinary physical strength and ability. Archie Martin testified that he was maintenance patrolman, had known Charlie Miller all of his lifetime; that he had hired him for this job. The witness saw Miller about ten days after the accident when the latter was on his way to see Dr. Harrison. Martin got a medical report from Dr. Harrison and sent it to the State Highway Department at Peoria, later sending a second report. This witness further testified that he had seen Charlie Miller working prior to the day of the accident; that he was apparently able-bodied and able to do a man's work. The witness further testified that he saw Miller from time to time after the accident; that he then complained of severe pain and that he rapidly fell off in weight.

Another witness, Thomas Booth, testified that he had worked with Charlie Miller on a W.P.A. project prior to September 25, 1935; that he had also worked with Miller in coal-

mining; that prior to the time of his accident Miller was apparently able-bodied and able "to carry a full load."

Dr. Clarence Van Epps testified that he is associated with the Medical School of the University of Iowa and specializes in nervous diseases; that in addition thereto he engages in private practice and in the course thereof saw Charlie R. Miller on August 30, 1936 at the hospital in Iowa City; that Miller at that time was emaciated and had an enlargement of about two hundred (200) per cent of the right testicle which was hard and irregular; that a complete medical examination of the patient was made which disclosed enlarged glands in the groin with abdominal pains suggesting testicular malignancy with retro-peritoneal. The doctor was given a history of the accident and testified that he did not think the trauma described to him was the essential cause of the testicular tumor. The doctor further testified that it is not possible in a case of malignant tumor to definitely state the cause thereof; that some malignant tumors are of traumatic origin but that in his opinion the testicular tumor which he found in this patient was not of traumatic origin. The doctor modified this opinion in cross-examination by stating that if the history of the case disclosed the patient was struck on the right testicle at the time of the accident it would have made a difference in his conclusion.

The wife of Charlie R. Miller testified that when he came home from work on September 25, 1935 he told her of his accident. That during the days that followed he complained constantly of pain. That there were no bruises apparent; that there was a swelling in the right testicle and that there was a redness there for three or four days after the accident. Claimant began to lose weight, then in January he began to feel better. The pain was not so severe and had moved into his side, but when he attempted to open a coal mine he was unable to do the work and Dr. Harrison ordered him to a hospital. The operation there resulted in the removal of the right testicle with a laboratory report of malignant tumor. According to the record Mr. Miller was never sick from the time of his marriage in June, 1929 until after the accident in question. That he was ill continually after that time until his death. A coroner's jury returned a verdict, "Death from injury sustained while in the employ of the Division of Highways," and the conclusion to be drawn from the testimony of all the wit-

nesses and the facts and circumstances in evidence is that there was a causal connection between Mr. Miller's death and the accident in question. His previous good health, the concurrence in time between the speedy development of his condition of ill health with the time of his accident, and the fact that a malignant growth developed immediately after the accident in question, and that the beginning thereof was evidenced by redness and swelling immediately following such accident, all lead to a conclusion that the accident was the beginning of Mr. Miller's trouble.

Dr. VanKypss stated on direct examination that he did not think that the trauma described to him in the history of the case was the essential cause of the testicular tumor; that it is not possible in a case of malignant tumor to definitely state what was the cause of the tumor; that some malignant tumors are of traumatic origin. On cross-examination he stated however that if the patient was shown to have been in good physical health prior to the time of the injury, it would have a bearing on the question; that if he was apparently in normal condition before the accident, then the accident might have played some part in the subsequent developments. That in Mr. Miller's case the malignancy did not only involve the right testicle but that the glands were involved up into the abdomen.

It further appears from the testimony of Dr. Smith that Mr. Miller suffered a loss of thirty pounds in weight during the one and one-half to two months' time following the injury.

Counsel for respondent contend that the case of *Simpson Co. vs. Ind. Comm.* 337 Ill. 454 cited by claimant is not applicable, but in this we cannot agree. We know that the medical profession is still earnestly seeking for knowledge as to the cause of cancer, and they are disagreed as to what may or may not cause cancer in a particular case.

In the *Simpson* case the court said:

"The evidence shows that prior to the day of the accident Carr was a strong, vigorous and active man. He had never been sick and had never required the services of a physician. The evidence of Hammond shows what happened at the time Carr pulled on the rope. He was never well after that time but grew steadily worse until his death. There is no question, under the evidence, but that he died from a lymphatic sarcoma. There is medical evidence which shows that the sarcoma was the result of the strain or sprain of the muscles of the back. If the death is fairly chargeable to an accident

suffered in the course of his employment as an efficient cause, compensation may be awarded although the sarcoma existed prior to the accident, provided the sarcoma was exaggerated or accelerated by the injury, but there must be a direct relation between the accident and the subsequent death. (*Springfield Coal Co. vs. Industrial Com.*, 303 Ill. 455; *Jones Foundry Co. vs. Industrial Com.*, 303 Id. 410; *Keller vs. Industrial Com.*, 302 Id. 610; *Centralia Coal Co. vs. Industrial Com.*, 301 Id. 418.) *If the act of Carr in pulling on the rope either caused a sarcoma or aggravated or accelerated a sarcoma which already existed, and his death resulted therefrom, his widow was entitled to compensation."*

The court finds in the case at bar:

That Charlie R. Miller died as the result of an accident which arose out of and in the course of his employment; that at the time of his injury he was married and stood in the relationship of loco parentis to his two stepchildren, being respectively of the age of eight and ten years at the time of said accident. (See *Faber vs. Ind. Comm.*, 352 Ill. 115.) Both of said children and their mother resided with and were wholly dependent upon the said Charlie R. Miller for support and care.

That said employee had been in the employ of respondent for less than one year and would be governed in his employment, by the statute of two hundred (200) working days per year; that his wages were Forty (40) Cents per hour on an eight-hour basis and that his annual wages would therefore be computed at Six Hundred Forty (\$640.00) Dollars. That he was entitled to temporary total compensation from the date of the injury September 25, 1935 to the date of his death, October 9, 1936, or a period of fifty-four (54) weeks at the rate of Twelve (\$12.00) Dollars per week.

That four times his average annual earnings would amount to Two Thousand Five Hundred Sixty (\$2,560.00) Dollars which said sum is increased under the provisions of paragraph 7 (h) of the Workmen's Compensation Act to Three Thousand One Hundred (\$3,100.00) Dollars as a minimum amount payable in case of death under the Act when there are two dependent children surviving.

That through the death of said employee, Charlie R. Miller, two causes of action have been created under the terms of Par. 8 (g) of the Workmen's Compensation Act—one in favor of J. Binnie Wolfe, Administrator of the Estate of Charlie R. Miller, Dec'd, for the amount due for temporary total disability to the date of the employee's death, and also for the medical and hospital bills incurred for his care; and the other in favor of his dependents, as a result of his death. (*American Steel Foundries vs. Ind. Comm.*, 361 Ill. 582.)

That the sum of Twenty-seven (\$27.00) Dollars has heretofore been paid by respondent to Dr. Harrison, leaving a balance of Twenty (\$20.00) Dollars unpaid upon his bill.

We further find that the children's share of the compensation due and arising out of the death of the said Charlie R. Miller should be paid to their mother, Edith Miller, for their support.

An award is therefore hereby made in favor of J. Binnie Wolfe,

Administrator of the Estate of Charlie R. Miller, Dec'd, for temporary total disability due Charlie R. Miller to the date of the

latter's death, in the sum of..... \$648.00

To J. Binnie Wolfe, administrator of the estate of Charlie R. Miller, dec'd, for the use of the following, to-wit:

| | | |
|--|----------|----------------|
| Dr. B. A. Harrison..... | \$ 20.00 | |
| Dr. Clarence VanEpps | 10.00 | |
| Dr. Fred M. Smith..... | 50.00 | |
| Dr. Nathaniel G. Alcock..... | 75.00 | |
| For the use of University of Iowa Hospital, et al., for hospitalization | 214.00 | |
| Dr. Dillon | 15.00 | |
| | | <hr/> \$384.00 |

A further award in addition to the foregoing is hereby allowed to Edith Miller for the use of herself and the said children, in the sum of \$3,100.00, less the sum of \$648.00, hereinabove allowed as temporary total disability compensation, payable in weekly installments at the rate of \$12.00 per week, making a net award in favor of the said Edith Miller of..... \$2,452.00

Of the said sum of \$2,452.00 so due the said Edith Miller, there has heretofore accrued and is due to the 10th of February, 1939, the sum of \$1,452.00 which said sum is payable at this time to the said Edith Miller, leaving a balance of \$1,000.00, payable in eighty-two (82) weekly installments of \$12.00 each and one final installment of \$16.00.

This award being subject to the provisions of an Act entitled, "An Act Making an Appropriation by Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," approved July 3, 1938 (Sess. Laws 1938 p. 83), and being by the terms of such Act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from said appropriation from the Road Fund in the manner provided for in such Act.

(No. 3219—Claimant awarded \$380.43.)

JELMAR OLSON, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 14, 1939.

WILLIAM G. THON, for claimant.

JOHN F. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made under.* Where it appears that employee of State sustained accidental injuries, arising out of and in the course of his employment, while engaged in extra hazardous employment, an award for compensation may be made in accordance with the provisions of the Act, upon compliance with the terms thereof.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

For more than a year prior to December 24, 1937, claimant was employed by respondent as a painter at the Illinois Eye and Ear Infirmary at Chicago. On the last mentioned date, while standing on a sink washing walls, claimant slipped and fell, and thereby sustained a fracture of the neck of the right femur.

He was taken to the Illinois Research and Educational Hospital, an X-ray was taken, and the leg placed in splints. He made a good recovery, sustained no specific loss, and no permanent disability, and returned to work on July 12th, 1938. He was paid his regular wages for the entire month of December, 1937.

From the facts in the record we find as follows:

1. That on December 24th, 1937, claimant and respondent were operating under the provisions of the Workmen's Compensation Act of this State.

2. That on said date claimant sustained an accidental injury which arose out of and in the course of his employment.

3. That notice of the accident was given to respondent, and claim for compensation on account thereof was made within the time required by the provisions of such Act.

4. That the annual earnings of the claimant during the year next preceeding the injury were \$2,600.00, and his average weekly wage was \$50.00.

5. That claimant at the time of the injury was a married man, and had no children under the age of sixteen years.

6. That all necessary first aid, medical, surgical and hospital services were provided by respondent, except as to \$4.00 expended by claimant for X-rays taken on the day of the injury.

7. That as the result of the injuries so sustained, claimant was temporarily totally disabled from December 24, 1937 to July 12, 1938.

8. That under the provisions of Section 8, Paragraphs (a) and (b) of the Workmen's Compensation Act, claimant is entitled to have and receive from the respondent, compensation for 28-3/7 weeks at Fifteen Dollars (\$15.00) per week, to wit, Four Hundred Twenty-six Dollars and Forty-three

Cents (\$426.43), and in addition thereto is entitled to the sum of Four Dollars (\$4.00) for money advanced by him for X-rays.

9. That all of such compensation has accrued at this time.

10. That the sum of Fifty Dollars (\$50.00) has been paid to apply on such compensation.

Award is therefore entered in favor of the claimant for the sum of Three Hundred Eighty Dollars and Forty-three Cents (\$380.43).

This award, being subject to the provisions of an Act entitled "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," approved July 3d, 1937 (Session Laws 1937, p. 83) and being by the terms of such Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the General Fund in the manner provided for in such Act.

(No. 3129—Claim denied.)

LEO ROSENTHAL AND MAX ROSENTHAL, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 15, 1939.

Claimant, pro se.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

CHARITABLE INSTITUTIONS—conduct of, governmental function. In the conduct of State charitable institutions the State exercises a governmental function.

SAME—negligence of employees of—State not liable for. The State is not liable for injury to, or death of, an inmate of a State charitable institution, resulting from the negligence or wrongful conduct of its officers, agents, servants or employees, as in conducting such institution it is exercising a governmental function and the doctrine of respondeat superior is not applicable to it.

MR. JUSTICE LANSFORD delivered the opinion of the court:

This is a claim for the sum of Ten Thousand Dollars (\$10,000.00) filed against the State of Illinois, wherein it is alleged that the death of Clara Rosenthal, which occurred in

a State charitable institution, was caused by the negligence of the agents of the State. The only charge in a four page, single-spaced, typewritten complaint is: "My claim is based on negligence, foul play, false reports, and wilful hiding of facts as to my sister's condition."

The Attorney General moved to dismiss the complaint on the grounds that claimants failed to set forth a claim which the State of Illinois, as a sovereign commonwealth, should discharge and pay in that said claimants seek an award predicated upon liability in the respondent for the death of claimants' sister, an inmate of a charitable institution operated and maintained by respondent; said death alleged to have been caused by the wrongful and negligent acts and conduct of officers and employees of respondent employed at said institution.

The sister, Clara Rosenthal, was admitted to the Chicago State Hospital at Dunning, Illinois on November 10, 1932, and died at that institution on November 30, 1932. The claim was filed on October 8, 1937.

The complaint in this case is very lengthy and more or less argumentative and many immaterial things are set out, and no direct specific allegation is made of any conduct on the part of the officers or agents or employees of the State, which resulted in the death of claimants' sister. Neither is it shown the claimants were dependent upon this sister. The complaint is drawn on the theory that mistreatment and improper care at the institution was the cause of the death.

The State, in the operation of a charitable institution is engaged in a governmental function and is not liable for injury to, or death of, an inmate, resulting from the negligent or wrongful conduct of its officers or employees.

Monahan vs. State, No. 3057 ;

Court of Claims Opinion filed Aug. 19, 1937 ;

Hollenbeck vs. Winnebago County, 95 Ill. 48 ;

Minear vs. State Board of Agriculture, 259 Ill. 549 ;

Tollefson vs. City of Ottawa, 288 Ill. 134 ;

Kinnare vs. City of Chicago, 171 Ill. 332 ;

Gebhardt vs. Village of LaGrange Park, 354 Ill. 234 ;

Fitzmaurice vs. State, 6 C. C. R. 247 ;

Hazelwood vs. State, 6 C. C. R. 259 ;

Heise vs. State, 6 C. C. R. 267 ;

Derby vs. State, 7, 145;
Jefferson vs. State, 8, 228;
Parks vs. State, 8 C. C. R. 535.

The doctrine of "respondent superior" does not apply to the State. The State, in the absence of statute, is not liable for the negligence or wrongful conduct of its agents, officers or employees.

Walton vs. State, 8 C. C. R. 501;
Jefferson vs. State, 8 C. C. R. 228;
Childress vs. State, 8 C. C. R. 223.

Where no liability exists upon which the State could be sued at law or in equity if it were suable, the Court of Claims has no jurisdiction to make an award.

Crabtree vs. State, 7 C. C. R. 207.

It will, therefore, be seen that respondent's position must be sustained.

It is well established that the State in the operation of a hospital for the insane is engaged in a governmental function and not liable for the wrongful or negligent acts of officers or employees of such institution resulting in injury to or death of a patient or inmate.

It is set forth that claimants' intestate, at the time of her death, was a patient of the state hospital for the insane located at Dunning, Illinois, and the claim is based upon the theory that the death was caused by mistreatment or improper care received at the hands of officers or employees of the institution.

The Court of Claims of this State has repeatedly denied such claims. The legal question involved has in the past been given thorough consideration. This Court has repeatedly held that in the management and operation of its charitable and penal institutions, the State is engaged in a governmental function, and has also repeatedly held that in the exercise of its governmental functions, the State is not liable for the negligence of its servants and agents under the doctrine of "respondent superior" in the absence of a statute making it so liable.

From the above and foregoing, we determine that there is no liability on behalf of the State, and the claim should be, and is hereby dismissed.

(No. 2438—Claim denied.)

JAMES P. O'KEEFE COMPANY, A CORPORATION, Claimant, vs. STATE OF
ILLINOIS, Respondent.*Opinion filed February 15, 1939.*

CRAHEN, SULLIVAN, O'TOOLE & SULLIVAN, for claimant.

JOHN E. CASSIDY, Attorney General; JOHN KASSERMAN
AND GLENN A. TREVOR, Assistant Attorneys General, for re-
spondent.

CONTRACTS—for grade separation pavement—rock encountered in construction of—when claim for extra compensation because of will be denied. Where claimant voluntarily proposes to, and does enter into a written contract with the State to construct a grade separation pavement, for a price agreed therein, in accordance with proposal submitted by him and with plans and specifications, forming part of said contract, containing provision that in the performance of same rock may be encountered, and that no extra compensation will be allowed for removal thereof, a claim for compensation, in addition to that fixed in contract, for removal of rock, cannot be made when no misrepresentations are made relating to presence or non-presence of rock, or any effort made to mislead claimant in regard thereto, prior to or at time of execution of contract and claimant testifies that prior to such execution he examined site of work and saw rock, as such claim is for extra compensation which is prohibited by the Constitution of Illinois.

SAME—when party estopped to deny terms of. In the absence of any fraud or material misrepresentations, a party who has voluntarily executed a written contract, based on proposal submitted by him, is estopped to deny any of its terms, and he will not be heard to assert any denial that such contract superseded all previous arrangements in connection therewith.

SAME—performance delayed by breach by another person of another contract—not entered into for direct benefit of claimant—when State not liable for damages resulting. The State is not liable for damages sustained by party, as the result of being delayed in the performance of his contract with the State for construction of grade separation pavement, due to breach by another person of another contract with the State, when such other contract is not entered into for direct benefit of such original party, but which is only an incidental benefit to him, in the performance of his contract, and he must look to such other person for redress.

SAME—performance delayed on account of delay of State in furnishing cement—due to exorbitant prices being fixed by manufacturers—against public policy—State within sovereign rights—award for damages not justified. Where State in a contract for the construction of a grade separation pavement by a private party, undertook to furnish the cement therefor, and in the interest of the general public delayed doing so, for the reason that cement contractors were demanding such exorbitant prices for cement, as to make the improvement so costly, as to be prohibitive and against public policy, it was acting within its sovereign rights and will not be held liable for any damages resulting from such delay, as the rights of the public must prevail over any rights of an individual.

MR. JUSTICE LINSCOTT delivered the opinion of the court :

Claimant filed its petition for award in this case on July 19, 1934, in the office of the Clerk of this Court, alleging that it is an Illinois Corporation; that on December 16, 1932, it entered into a contract with the proper Department of the State of Illinois for Grade Separation Pavement Contract No. 5049, and referred to as "State Bond Issue, Route No. 4, Federal Aid Project, Section 430V-X" in Cook County.

A proposal had been made by claimant pursuant to a notice sent out by the Division of Highways to contractors. The notice contained information that sealed proposals for the improvement in question would be received by the Department of Public Works and Buildings at the Division of Highways, Springfield, Illinois, until ten o'clock A. M., October 14, 1932, and at that time publicly opened and read. A description of the work was given in this notice to contractors, and instructions were also given; through the office of the District Engineer, plans for this work were available for office examination only; and plans for this work could be purchased by prospective bidders at the office of the Division of Highways, Springfield, Illinois. This notice also contained information that proposal forms could be obtained from the office of the Division of Highways, Springfield, Illinois, or from the District Engineer, and the Department reserved the right to reject any and all proposals. This notice was dated September 28, 1932 and signed by the Chief Highway Engineer.

Special Provisions were also forwarded to claimant prior to the time of the bid concerning "Standard Specifications for Road and Bridge Construction," adopted January 2, 1932, which govern the construction of State Bond Issue Route No. 4, and also this project, and the claimant was notified that in case of conflict with any part or parts of said specifications, the special provisions should take precedence and should govern.

In the Proposal of the claimant, it was proposed that the plans for the work were to be those prepared by the Chief Highway Engineer and approved by the Director of the Department of Public Works and Buildings on September 28, 1932, which plans are designated as State Bond Issue Route 4, Section 430 V-X Cook County, and which cover the work

described in the proposal. The specifications were to be those prepared by the Department of Public Works and Buildings and designated as "Standard Specifications for Road and Bridge Construction" adopted by it January 2, 1932, with certain amendments specifically set out and of which, claimant had notice.

The contract was dated December 27, 1932, and entered into between The State of Illinois, by the Department of Public Works and Buildings and claimant. The second paragraph thereof provided as follows:

"2. WITNESSETH: That for and in consideration of the payments and agreements mentioned in the proposal hereto attached, to be made and performed by the party of the first part, and according to the terms expressed in the bond referring to these presents, the party of the second part agrees with said party of the first part at his/their own proper cost and expense to do all the work, furnish all materials and all labor necessary to complete the work in accordance with the plans and specifications hereinafter described, and in full compliance with all of the terms of this agreement and the requirements of the engineer under it."

And the third paragraph of said contract provided as follows:

"3. And it is also understood and agreed that the notice to contractors, special provisions, proposal, and contract bond, hereto attached, and the plans for State Bond Issue Route No. 4, Federal Aid Project No. Section 430 V-X, in Cook County, dated September 28, 1932, and the 'Standard Specifications for Road and Bridge Construction,' adopted by the Department January 2, 1932, are all essential documents of this contract and are a part hereof."

The contract was to be performed by the following July 1, 1933.

Claimant contends that subsequent to the execution of the contract and in accordance with the terms and provisions thereof, it began the work and in all respects complied with the terms and provisions of the contract, and all of the work was completed by claimant on July 26, 1933; that prior to the execution of the contract and at the time the bids were submitted in reference to the cost of the work, certain plans and specifications were submitted to the claimant herein by the respondent; that the plan notes and blue prints submitted to the claimant had marked across the face in large type the word "Void" and that other provisions enumerated were obliterated. Claimant further contends that in accordance with the plans and specifications, it submitted its bill for the cost of said work on a unit basis.

Claimant also charges that during the course of the work, rock was encountered, and it became necessary to drill, blast and excavate the rock in the construction of a culvert at Station 498-67, and the expense of excavating this rock in this culvert amounted to \$2,695.75.

Claimant also charges that under the terms and provisions of standard specifications for road and bridge construction, namely,—Article 37.2 Construction Methods, it is provided that:

"If solid rock is encountered which is not shown on the plans or mentioned in the special provisions, additional compensation will be allowed therefor as provided herein under 'Basis of Payment.' Solid rock shall include all boulders measuring one-half ($\frac{1}{2}$) cubic yard and upwards, and all solid or hard ledge-rock which requires continuous drilling and blasting for economical removal."

It is charged that the plans and specifications submitted to the claimant did not show solid rock would be encountered, and claimant, therefore, asks compensation on the basis of costs plus, and that in view of the fact that the blue prints and other specifications submitted were unintelligible and failed to show that the rock in question was to be removed without cost, by virtue of such facts, claimant is entitled to compensation in the amount above set forth. This part of the contract was completed on February 23, 1933; that the claimant afterwards submitted a bill, but the same has not been paid or any part thereof.

Claimant is also requesting that it be allowed compensation for the reason that the State Department conducting this work had agreed that the Consumers Company was to furnish all material for the fill on this improvement; that agreement was as follows:

"The Consumers Company agree to furnish the fill material for the approaches to the grade separation structure and the State agrees to use the fill so furnished.

"(A) The material is now located on Consumers Company property at McCook, Illinois, and lies adjacent to the rim of the quarry of the Consumers Company at that place.

"(B) The Consumers Company agrees to load free of charge said material on equipment of the State or State's contractor as material is called for, provided reasonable notification is given the Consumers Company when hauling operations are to begin."

It is contended that Consumers Company were given the proper notice but failed and neglected to furnish and load the

necessary material to claimant as called for under the terms of the contract and the delay was caused in part by reason of the fact that the Consumers Company was endeavoring to use old and defective equipment which from time to time became disabled and therefore the claimant was unable to secure the necessary material to proceed with the work; that from December 29, 1932 up until April 11, 1933, the break-down hours amounted to 173 hours; that during this time it was necessary for the claimant to maintain five ton dump trucks and chauffeurs to operate the same, and that the fair, reasonable and customary charge per hour for trucks such as were used by the claimant amounted to \$3.82 per hour, or a total charge of \$660.86; that a fair, reasonable and customary charge per hour for chauffeurs hire was \$1.00 per hour, or \$173.00; that it was necessary to expend gas and oil in maintaining the trucks during the 173 hours; that the total cost of the gas and oil was \$104.49; that the cost of compensation insurance during said period of time amounted to \$10.92, making a total charge of \$949.27.

Claimant further contends that all during this time it was ready and willing to carry out its terms of the contract, and that the State has refused to pay this bill.

Claimant also charges that the State failed to furnish cement as agreed under the terms of the original contract, and the claimant having received no notification of any kind from the State that there was to be any delay in the furnishing of the cement, was ready, willing and able to proceed with the execution of the work, and by virtue of the fact that said material was not furnished by the State, it became impossible for the claimant to proceed with said work from May 29, 1933 up to and including June 8, 1933, and claimant charges that the labor and material furnished by claimant during this period of time, caused an expense to this claimant in the sum of \$3,307.03, and none of these bills have been paid.

Claimant further charges that there is now due and owing to claimant, the sum of \$6,952.05 for labor and materials furnished.

We will first determine whether or not claimant, for the reasons alleged in the complaint, is entitled to compensation on account of the rock removed in the construction of the culvert. Plans for the proposed improvement were put in

evidence by claimant. There appears to be fourteen sheets of blue prints. Each page is approximately 23 inches wide and 36 inches long. The index to the sheets on the first page shows that page 2 contains general notes. The right half of this page is set off on white straight lines on a blue back ground in rectangular form. The white lines are twenty inches long and parallel to each other and the end lines are approximately fourteen inches long and parallel to each other. The matters set forth in the page are paragraphed and each paragraph has a word or two showing the title of the paragraph underscored about the center of the page. There are all told on this page, twelve different paragraphs and the third paragraph is marked in white letters one-half inch wide "Void," and that is about the center of the page. It appears that someone has attempted to erase that particular paragraph which is marked "Void." The letters of the word "Void" are placed lengthwise to the paragraph and parallel to either of the end lines. The letters of the word "Void" do not overlap or appear in any other paragraph. It is a matter of common knowledge that blue prints exposed to strong sun-light will fade in color. These blue prints appear to have had much usage, and it is quite probable they were exposed to strong light.

It also appears from the evidence that the proper State Department in its notice to contractors before the contract was entered into or figured upon, stated that the plans for the work were available for office examination only at the office of the Division of Highways, Springfield, and notice was given where plans could be purchased.

It also appears from Sheet No. 4 on the left hand side of the page, in letters clearly legible, the following:

NOTE: In Constructing the Trench for Laying the Proposed Pipe, *Rock* May Be Encountered. *See Special Provisions.*

On the right hand side of the page, below the center thereof, appears three lines in letters of white on a blue back ground and clearly legible. Those lines are as follows:

1. Profile of crown of proposed improvement.
2. Profile of existing ground line.
3. Approximate profile of top of rock.

On the extreme right hand side of this sheet, are the datum lines. From each of the lines above mentioned, arrows, con-

sisting of white straight lines with an arrow on the end, directly connect each of the lines to the place which the line describes, and an index of this particular sheet is in the upper left hand corner of the first page, and is as follows:

Sheet No. 4 Plan & Profile Station 483 + 00 to Station 503 + 00.

Mr. James P. O'Keefe, President of plaintiff corporation, testified as follows: (Page 25 of the transcript.)

Q. Prior to the time that you entered into this contract, will you tell us briefly, what, if anything, was done?

A. Before we got the contract we went out and looked it over and when the bids were being sent in, we sent our bid in. We check the plans and—there was a quantity of rock in there, but—

Q. Before we go into that, Mr. O'Keefe, did you receive any communication from the State of Illinois, prior to the time you signed the contract, no notice—

A. We received notice that they would be letting on different jobs; that was the only job we bid in for.

On page 2 of the plans, (one of the paragraphs of which claimant testified that he took for granted were void), was the following with the headline underscored:

"Excavating For Culvert.

"Rock may be encountered in extending the existing culvert. If rock is encountered no extra compensation will be allowed."

No where in the evidence does it appear that any misrepresentations were made to claimant concerning the rock or any effort of any kind made to mislead claimant. It appears from Mr. O'Keefe's own testimony:

A. Before we got the contract we went out and looked it over and when the bids were being sent in, we sent our bid in. We checked the plans and—there was a quantity of rock in there, but—

The plans and specifications were made a part of the contract, and the "Standard Specifications" were a part of the contract. This consists of a book of 368 pages. Under these circumstances, we feel that claimant is estopped from now making a claim for extra compensation on account of the rock, and public policy would deny claimant any rights

for additional compensation for the reasons hereinbefore set forth.

"A party proposing the terms of a contract cannot be heard to object to them."

Faunce vs. Burke, 16 Pa. St. 469.

"In the absence of fraud or misrepresentations, when a party has executed a written contract, he is estopped to deny its terms.

"If a party to a contract had any objections to the provisions of a contract he signed, he should have refused to make it. Having executed it, his mouth is closed against any denial that it superseded all previous arrangements."

Parish vs. United States, 8 Wall. 489, 19 U. S. (L. ed.) 472.

The word "Void" over the third paragraph on page 2 of the plans, clearly only applied to that paragraph. Nothing appears in the record that would lead claimant to assume that the word "Void" as appeared on page 2 invalidated that whole page and all paragraphs thereon contained. Particularity is this true when one considers the reference made to rock on page 4, which showed a profile of the part of the improvement known as the culvert, and the Standard Specifications which provides that rock may be encountered in extending the existing culvert, and if rock is encountered, no extra compensation will be allowed. We, therefore, hold that claimant is not entitled to this part of the claim.

It is next urged that claimant is entitled to compensation because the Consumers Company did not carry out its agreement to load free of charge, either material or equipment of the State or State's contractor as material is called for, provided reasonable notification is given the Consumers Company when hauling operations are to begin. This company was to furnish the "fill" for the improvement and did advise claimant that the Consumers Company would load the material as called for, apparently meaning to put the filling material in the trucks of the State or the contractor, after having received notice. Due notice was given, but no limit was placed upon the number of trucks that were to be used in hauling the fill. When claimant entered into the contract with the State, it had notice of what the Consumers Company was to do by way of furnishing this fill, but the Consumers Company undertaking is quite vague and indefinite. No where does it appear that there was any consideration given to the State or that the State paid any consideration for

the fill. No where does it appear that claimant ever discussed with the Consumers Company what means they were to use in loading this material, or the amount to be loaded in one day, but it is clear that if there is any default on behalf of the Consumers Company, claimant should look to it for reimbursement. The Consumers Company had agreed to load this material either for the State or its contractor at a place adjacent to the rim of the quarry of the Consumers Company.

The law is settled in this state that if a contract is entered into for the direct benefit of a third person not a party thereto, such third person may sue for breach thereof. The test is whether the benefit to the third person is direct to him or is but an incidental benefit to him arising from the contract. If direct he may sue on the contract; if incidental he has no right of recovery thereon. This rule has been announced without variation in numerous cases decided by the Supreme Court of Illinois. See *Carson Pirie Scott & Co. vs. Parrett*, 346 Ill. 252, and cases therein cited.

Compensation to claimant on this contention will, therefore, be denied.

Lastly, the claimant requests compensation because it was delayed eleven days on account of the failure of the State Department to furnish cement as provided in the contract. The contract required that claimant should fully perform his contract by July 1, 1933. It did not fully perform its contract for twenty-five days thereafter, or until July 26, 1933, so claimant was in default.

Mr. Hoehl testified for claimant and he was asked these questions and made the following answers: (Transcript 46.)

Q. Did any information come to you before you began paving the highway, Mr. Hoehl, that the State might not be able to furnish the cement?

A. No.

Q. No word came to your Company?

A. As far as I know, no information reached us.

Q. As far as your own information goes, then there was never any trouble between the Cement Companies and the State of Illinois, about furnishing cement, is that right?

A. Yes. I mentioned that before.

Engineer Holloway testified for the State (Transcript 61) that various times before claimant was ready to do any

paving on this job he had had conversations concerning the furnishing of cement; that he talked to Mr. O'Keefe and Mr. Hoehle; that he had been informed by the proper department that there would be a delay in furnishing cement.

A letter was sent to claimant under date of May 5, 1933, and is known as Respondent's Exhibit No. 1. That letter is as follows:

"As you undoubtedly are aware by this time, the State is having some difficulty in furnishing cement for the work for which you have a contract. We do not know at this time just when this situation will be cleared up.

"The purpose of this letter is to caution you regarding starting any new work or operations which will require cement, until such time as the cement situation is definitely cleared up. As soon as we have knowledge that cement will be available we will so inform you.

Yours very truly,

KENDRICK HARGER,

Acting District Engineer."

Neither of the parties to this contract contemplated that the State should furnish any cement for claimant immediately after the contract was entered into, which was in the month of December, 1932. It was well known that the claimant did not need cement at that time of the year or for sometime thereafter and until many other things were done. The fill for this overhead had to be made and properly packed. It appears that Utilities Companies, such as the Telephone Company, had certain rights which had to be respected. The evidence shows that the first cement was furnished during the first week of June, 1933. The evidence also conclusively shows that the telephone Company was installing cables over this improvement which they had a right to do under the contract, and that other work was being done by the claimant on this improvement up to about that time. No where does it appear that claimant was delayed in removing its machinery to another job or was delayed in another job by reason of the failure of the State to furnish cement. The evidence does show that the claimant placed its concrete mixer and other paving appliances on the job on May 29, 1933, four days after it had notice from the State that there would be a delay in furnishing cement. It was a matter of common knowledge that the cement producers were demanding exorbitant prices from the State for cement. The people of the State of Illinois were vitally interested. It might well be assumed that

cement manufacturers knew that the State had agreed to furnish cement to numerous contractors and that contracts were then in existence for public improvements which the State had entered into. It also might well be assumed that the public officials of the State of Illinois, through its Chief Executive, the Governor of the State of Illinois, rightfully felt that the action of the cement manufacturers or dealers was such as to make those public improvements so costly as to be prohibitive and against public policy.

The meaning of the phrase "public policy" is vague and variable; courts have not exactly defined it, and there is no fixed rule by which to determine what contracts are repugnant to it. It is impossible to define with accuracy what is meant by that public policy for an interference and violation of which a contract may be declared invalid. It may be understood in general that contracts which are detrimental to the interests of the public as understood at the time fall within the ban.

Pope Mfg. Co. vs. Gormully, 144 U. S. 224, 36 L. ed. 414.

Courts have however, frequently approved Lord Brougham's definition of public policy as the principle which declares that no one can lawfully do that which has a tendency to be injurious to the public welfare. This principle, it has been said may be termed "policy of the law or the public policy in relation to the administration of the law."

People vs. Monroe, 349 Ill. 270; *People ex rel. Peabody vs. Chicago Gas Trust Co.* 130 Ill. 268.

The question what is public policy in a given case is as broad as the question what is fraud in a given case and is addressed to the good common sense of the court. The relations of society become from time to time more complex. Statutes defining and declaring public and private rights multiply rapidly. Public policy often changes as the laws change, and therefore new applications of old principles are required.

Wakefield vs. Van Tassell, 202 Ill. 41.

The exorbitant price demanded by cement manufacturers effected the whole State of Illinois, and it must be conceded that such action was injurious to the public. This claim for

damages arising from the fact that the State could not furnish cement must be denied on the grounds of public policy.

It may be contended that in repudiating any liability on behalf of the State for its failure to furnish cement under the circumstances in this case is an unconscionable act. The answer to this is that in a situation of this kind the interest of the public, rather than the equitable standing of individual parties, is of determining importance, and we base our opinion upon principles of public policy and to conserve the public welfare.

Assuming for the sake of the argument that everything was in readiness for claimant to use cement. No paving was laid for the reason that the State did not furnish cement for that purpose. The State, through its Chief Executive, was objecting to the exorbitant prices that cement manufacturers were attempting to charge the State. Owing to the unusual situation in this regard, the press of the State, as news items, daily reported the controversy, which lasted some considerable time, and the subject was much discussed privately, but it is said that the State entered into this contract with claimant and agreed to furnish the cement when claimant was ready. The question is: Should the State be held to the same rules as any private party entering into a contract of this kind?

In the case of *United States vs. Warran Transportation Company*, 7 Fed. (2d) 161, in discussing a similar feature, the court said: "When the United States is a party litigant it assumes one of two characters; it may appear in the character of a sovereign or in the character of contractor." Continuing, the court held: "It follows, therefore, that when the United States appears as a contractor, it cannot be held liable for an obstruction to the performance of its contract resulting from its public and general acts as sovereign, whether legislative or executive." The court cited numerous authorities.

The Supreme Court of the United States in the case of *Horowitz vs. United States*, 267 U. S. 458, 69 L. Ed. 736, dismissed the petition, on demurrer, for failure to state a cause of action. On December 20, 1919, the claimant submitted a bid for certain silk, and at that time an agreement was made that the claimant would be given an opportunity to resell the silk before completing the payment of the purchase price, and

that the "departments of the government having jurisdiction in matters of this kind" would ship the silk, which was then in Washington, within a day or two after shipping instructions were given. On December 22, claimant was notified by the Board that the sale of the silk to him had been "approved" and claimant thereupon paid part of the purchase price, and on January 30, 1920, he sold the silk to a silk company in New York. On February 16, he paid the balance of the purchase price and wrote the board to ship the silk at once, by freight, to the silk company. Two days later, claimant was notified by the board that it had received the shipping instructions and had ordered the silk to be shipped. Thereafter the price of silk declined greatly in New York market, until March 4. On that date the claimant learned that the silk was still in Washington, and had not been shipped because the government, through one of its agencies, the United States Railroad Administration, had, prior to March 1, 1920, placed an embargo on shipments of silk by freight and that the shipment of silk for claimant had been held up. Afterwards, the government shipped the silk to the consignee, by express. It arrived in New York on or about March 12. The consignee then refused to accept delivery on account of the fall in the prices. And "by reason of the government's breach of the contract and agreement in placing an embargo, and failing to ship the silk either by express or freight prior to March 4, 1920, the price of silk having declined, the claimant was forced to sell the said silk for \$10,811.84 less than the price the consignee had agreed to pay for same had it been delivered in time." The petition alleges that the claimant is entitled to recover from the United States the said sum of \$10,811.84, "for and on account of the violation of the said agreement" and prayed judgment. The court affirmed the Court of Claims and held that the United States, when sued as a contractor, cannot be held liable for an obstruction to the performance of a particular contract, resulting from its public and general acts as a sovereign. *Deming vs. United States*, 1 Ct. Claims, 190, 191; *Jones vs. United States*, 1 Ct. Claims, 383; *Wilson vs. United States*, 11 Ct. Claims, 513.

In the Jones Case, 1 Ct. Claims, 383, the court said: "The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the

United States while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons. In this court the United States appear simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants."

By a parity of reasoning, the same rules would apply to the State of Illinois acting in its sovereign capacity.

The action of the State Highway Department in denying these claims is held to be proper, and the claims will, therefore, be denied.

(No. 2936—Claim denied.)

ILLINOIS CENTRAL RAILROAD COMPANY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 14, 1939.

GRAHAM & GRAHAM, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

PRINCIPAL AND AGENCY—*authority of agent of State—extent of—one dealing with bound to know.* Where railroad seeks to recover for the value of services rendered and materials furnished in repairing tracks on grounds of State institution, on order of grounds superintendent of said institution, it must show that he had authority to bind State therefor, and where no such authority is shown no recovery can be had, as one dealing with an agent of a municipality is bound to know the extent of the authority of said agent to bind his principal.

CONTRACTS—*prohibited by law—services rendered thereunder—no recovery can be had for—claim for reasonable value on quantum meruit—no contract implied to pay for—when award denied.* There can be no recovery of amount fixed in contract, where contract is prohibited by law and no action will lie to recover on quantum meruit for reasonable value of services rendered and materials furnished thereunder, as no contract will be implied in a case where an express contract is forbidden, and an award based on such claim must be denied.

SAME—customs and usages—in conflict with statute are void. It is the generally accepted rule of law that any usage or custom in conflict with an existing statutory enactment is void.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claimant filed its complaint on the 31st day of July, 1936, alleging that for many years last past it had been lawfully engaged in the business of a common carrier of freight and passengers for hire to and from points in the State of Illinois, and to and from points within the State of Illinois to points within the State of Illinois to points without the State of Illinois, and in the general business of conducting a railroad; that it owns a tract and right of way adjacent to the grounds of the Kankakee State Hospital, Kankakee, Illinois; that for the purpose of serving the Kankakee State Hospital, claimant agreed to lay out and construct a switch track or tracks connecting the main track with coal storage plant, power plant, generating plant and other buildings belonging to the State of Illinois at the Kankakee State Hospital.

It is further alleged that in order to maintain the tracks and equipment so as to be in safe and proper condition for operation and for service to the State Hospital at Kankakee, it became necessary to make certain repairs on the switch track and roadbed; that the claimant made the necessary repairs and replacements as are set forth in an itemized statement attached to the complaint. It is also alleged that such repairs were made at the direction and under the order of the officer there in charge of said track and grounds for the State of Illinois, pursuant to the custom and practice in such cases.

It is also alleged that after the work was done the items charged were approved and accepted by the officer in charge of the premises representing the State of Illinois.

A full and complete blue print showing the location of the tracks, and an itemized statement for the materials and services furnished, were attached to the complaint. The total bill amounts to \$1,053.01.

The evidence shows there were 3,460 feet of track on the hospital grounds, and that such track was in a very bad state of repair; that it was unsafe to take a heavily loaded car or an engine over the track; that the ties were rotted and the rails were very apt to spread and as a matter of fact

the rails had become too far apart. The evidence conclusively shows that this track was unfit for use; that it was necessary to have the track in proper repair because the hospital with a population of about 4,000 inmates, plus its officers and attendants, daily needed, in the colder months, shipments of coal, and during all months, shipments of necessary supplies. The track was in daily use. Claimant repaired this track and made it safe to use—put many new ties in it, straightened the rails, furnished the spikes, plates and all necessary repair.

This track was originally constructed at the time the hospital was built—about 1878. The track west of Highland Avenue is maintained by the State. John Gallagher was the track supervisor in the employ of claimant. Sam Defiglia was the section foreman who had charge of the track involved. When the track needed repairs the section foreman would report to the supervisor, John Gallagher. Mr. Gallagher would then take it up with the hospital authorities for permission to make repairs on the track. The hospital was billed the actual cost, plus ten per cent. It was a part of Mr. Gallagher's duties to report the condition of the track. For many years last past, the authorities of the State Hospital at Kankakee would acknowledge the bill and cause it to be paid. Mr. Gallagher, the superintendent, dealt direct with the Ground Superintendent. Mr. William L. Rieck, a resident of Kankakee, was Superintendent of Grounds at the time the repairs in question were needed. His title was Ground Superintendent. Among other things, it was a part of his duty to see that this track was cared for. The track served the power house, boiler room and warehouse, where supplies were received by the carload and unloaded on that track. All coal, grocery supplies and general supplies were brought in over that track. Mr. Rieck testified that he remembered that the section foreman advised him that the track was in need of repair and asked for permission to make the repairs, and he, Rieck, as Ground Superintendent, authorized him to go ahead, and gave him a letter, a copy of which letter is marked Exhibit One and is as follows:

"Illinois Central Railroad

GENTLEMEN: You are hereby allowed to proceed with the repairing of our switch as per the recommendation of your foreman, Sam Deffigia.

Kankakee State Hospital,

W. L. Rieck,

Ground Superintendent."

Pursuant to this letter, the claimant proceeded to make repairs as it had done many times in the past.

The Attorney General contends that Rieck had no authority to authorize the repairs; that under the statute, the Director of the Department of Public Welfare had such power, and had power to examine every plan and specification for new construction or repair exceeding in estimated value one thousand dollars, and shall examine into every plan and specification of new construction or improvement, if such improvement exceeds two hundred dollars in cost: Provided, that all contracts for new construction, improvement or repair must be approved by the State architect or his consulting engineer and by the board, if they exceed in value one thousand dollars, and by the fiscal supervisor, if they exceed in value two hundred dollars: Provided, further, that such approval is also required when such work is undertaken by the management of any institution without contract. There is also a provision pertaining to emergency, such as the breaking down of equipment.

As we view this matter, an emergency did not occur. The track was allowed to become in a bad state of repair by the neglect of the State employees located at Kankakee Hospital. The condition of the tract was not the result of an accident but the natural wear and tear that would occur to any track, and must have been known to all parties concerned. Here is a statute dealing directly with the subject in question, and this case illustrates the necessity of such a statute. The authority given the Illinois Central Railroad Company to make the repairs was so vague and informal that only those of the utmost integrity and good faith, such as the claimant, would fail to take advantage of the situation. Certainly, had the claimant been less honorable, under the circumstances, the State would have received a much larger bill. This manner of making repairs had been going on for many years, but it is the generally accepted rule that any usage or custom in conflict with an existing statutory enactment is void.

We cannot make an award in this case for these materials and repairs because of the statute.

In the case of *Green & Sons Company, a corporation vs. State of Illinois*, 9 C. C. R. 218, we held that there can be no recovery of amount fixed in express contract for services rendered thereunder, where the said contract is prohibited by law and a subsequent action will not lie to recover on quantum meruit for reasonable value of said services rendered under said contract on an implied contract to pay for same as no contract will be implied in a case where an express contract is forbidden and an award based on such claim must be denied. In that opinion we referred to the exhaustive annotation to the case of *Johnson County Savings Bank, et al. vs. City of Creston*, (212 Iowa 929) reported in 84 A. L. R. 926. Many additional authorities may be found in a similar annotation to the case of *United States Rubber Products vs. Batesburg*, 110 A. L. R. 144.

Counsel for claimant filed an able and persuasive reply brief but we are compelled to hold that whoever deals with a municipality does so with notice of the limitations on it or its agents' powers. All are presumed to know the law, and those who contract with it or furnish it supplies do so with reference to the law, and, if they go beyond the limitations imposed, they do so at their peril. This may seem unjust to the claimant but the answer to that is: That it is better that a private individual suffer as plaintiff must do in this case than have this court let down the bars and permit statutory enactments for the benefit of the public at large to be ignored so that the unscrupulous may unfairly and unjustly obtain public moneys. We cannot recognize or put the stamp of approval on the actions of the State officials in entering into such an informal contract.

The claim of the plaintiff, therefore, must be denied.

(No. 2538—Claim denied.)

WILLIAM WASSON, Claimant, vs. STATE OF ILLINOIS. Respondent.

Opinion filed March 14, 1939.

CHARLES E. LEE, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—burden of proof on claimant to show accident and injury resulting therefrom—when claimant fails to sustain. In claims under the Workmen's Compensation Act, the burden of proof is upon claimant to show that an accident occurred and that as a result thereof he sustained personal injuries, and where it appears that at the time of the alleged accident that five persons were working with claimant, none of whom knew of, or saw the accident, upon which claimant relies, or any accident, or who knew of claimant sustaining any injury or saw him sustain any, at the time alleged, and the only evidence as to the accident and injury is the testimony of claimant, without any showing of past or present objective conditions, he has failed to sustain such burden and no award can be made.

SAME—proof of past or existing objective conditions etc.—necessary to justify award under. An award for compensation under the provisions of the Workmen's Compensation Act, can only be made, for injuries, and only such injuries as are proven by competent evidence, of which there are or have been objective conditions or symptoms proven, not within the physical or mental control of the injured employee himself, and unless there are or have been such objective conditions or symptoms, no award for compensation can be made.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

It is claimed that William Wasson, while aiding in the removal of a stairway was severely injured about the back of his head, neck and shoulders when the staircase slipped and fell on him on July 20, 1934. It is charged that the accident was witnessed by a number of fellow workers. Notice was given to the Macon County Illinois Emergency Relief Commission, and claimant was treated by Dr. W. P. Davidson of Decatur, Illinois. At the time of the accident claimant was being paid at the rate of \$1.10 per hour but was only employed partial time, receiving \$39.60 each two weeks. It is charged that from the date of the injury, July 20, 1934 until November 13, 1935, claimant was "practically incapacitated from work of any sort" and that from that time until the date of the hearing he had worked occasionally under the Emergency Relief.

At the time of the accident he was married and stood in the relationship of parent to four children under sixteen years of age.

Claimant is asking Thirty-one Hundred Dollars (\$3100.00) based on total and permanent disability as an employee of the Illinois Emergency Relief Commission.

It is true that at least five other men were working with him at the time of the removal of the staircase in question.

but none of them knew of any accident to the claimant or of any injury received by him although they were there all of the time, and none of them knew of the staircase slipping or falling or of anything unusual having occurred during the removal of the staircase. Claimant finished his day's work and worked a day or two after that, and then he was directed to consult Dr. W. P. Davidson of Decatur, Illinois, and later Dr. F. E. Smith and his associate, Dr. Pence. He has received direct relief, having no employment and not being employed because of his alleged injuries. Medical services have been rendered to claimant on order of the Macon County Emergency Relief Committee.

The alleged accident did not leave any objective symptoms. The testimony discloses that there were no lacerations, abrasions, swellings or discolorations.

Under the facts in this case, a claim for award must be denied. Before one may recover a claim of this kind, the burden is upon him to prove by a greater weight or preponderance of the evidence that he suffered an accident and that he received an injury.

Section 145, Chapter 48, Illinois Revised Statutes 1937 sub-paragraph (i) 3 states that:

"Provided, further, that all compensation payments named and provided for in paragraphs (b), (c), (d), (e) and (f) of this section, shall mean and be defined to be for injuries and only injuries as are proven by competent evidence, of which there are or have been objective conditions or symptoms proven, not within the physical or mental control of the injured employee himself."

Claim for award will, therefore, be denied.

(No. 3022—Claimant awarded \$7.50.)

CLEMENT WARKINS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 15, 1939.

Claimant, *pro se.*

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—when award may be made under. Where it appears that employee of State sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra hazardous employment, an award for compensation for same may be made in accordance with the provisions of the Act, upon compliance with the terms thereof.

Mr. JUSTICE YANTIS delivered the opinion of the court:

It appears from the record that claimant went to work in the highway department on December 19, 1935 as an extra man in grubbing trees. He worked December 19th, 23rd, 28th, 30th and 31st. On the later date they were on S. B. L. No. 89 near Kasbeer grubbing out trees under the direction of James Reilly. They had cables and ropes attached to a tree and stretched across the hardroad ready to pull the tree over. The traffic was heavy and according to the foreman they waited to let as many cars get by as they could. One car came along and when the driver seemed impatient, the workmen unhooked the tackleblocks and let them down flat on the slab; then motioned to the driver to go ahead. When he drove over the ropes one of the ropes caught on the car and jerked claimant's feet out from under him and dragged him about ten or fifteen feet. There were several inches of snow on the ground at the time, and when claimant got to his feet Mr. Reilly asked him if he was hurt and whether he should go to a doctor. Claimant said "No, that he was not hurt and would be all right." He then returned to his work and finished the day. Foreman Reilly had received orders to lay off the extra men at the close of work that day and claimant was notified before leaving the job. Two or three days after this Foreman Reilly was told by a filling station attendant that claimant desired to see him. Reilly called at Warkins' home and was told by the latter that his finger hurt. Reilly took the doctors' copy of the accident report and went to see the doctor and had the latter make out the report according to the facts as given them. This report under date of January 7, 1936, signed by Dr. J. M. O'Malley, shows the nature of the injury to be, "Contusion of muscles of right leg below the knee and injury to the knee joint." The treatment prescribed was, "Rest, hot applications and bandaging," and the length of his disability was estimated at "one week." A letter to Mr. Goeke of the highway department from Dr. O'Malley states that he saw the patient but once and that his bill for services to claimant had been paid. The only evidence of any payment is the amount of \$1.00, paid by Mr. Goeke and this would indicate that only one treatment by the doctor was necessary or was incurred.

Claimant contends that he was disabled until the last of February and that he should be entitled to \$1.60 per day for the months of January and February, or a total of \$94.40.

Unless the period of temporary total incapacity for work lasted for more than six working days immediately following the accident, no award is due under the terms of the Workmen's Compensation Act.

We find from the record that claimant suffered an accident which arose out of and in the course of his employment. While he was apparently unemployed thereafter for a period of two months, the record does not support a finding that claimant suffered any temporary total incapacity for work as a result of such accident for a period in excess of six days thereafter. Dr. O'Malley's report, dated January 7, 1936, shows that patient would be able to return to work in one week, and that there would be a complete recovery within that time of the injuries then complained of.

On April 29, 1936 Dr. O'Malley wrote a letter to Mr. Goeke of the highway department, stating that he saw the claimant but once, and that in his opinion at that time he should have been able to return to work in a week. In this letter he further stated that, "From the evidence I now gather it appears he was disabled for a much longer time . . . but he did not come to see me and I was not aware of his condition."

In his testimony at the hearing on March 12, 1937, Dr. O'Malley stated that at the time he made out the above report and at the time he wrote the above mentioned letter, he thought the statements therein made were correct, and that to the best of his opinion they were correct. Apparently the only evidence as to claimant's condition that Dr. O'Malley had, as referred to in his letter, were statements made to him by the claimant on or about the time the doctor wrote the letter in question.

Foreman Reilly testified that immediately after the accident claimant got to his feet and when asked if he was hurt said, "No, he thought he would be all right," and that claimant proceeded to work the balance of the day. That he laid him and the other extra men off that evening as that was the last work he had for them at that time.

There is no competent and sufficient evidence in the record upon which to support an award for any period in excess of two weeks.

Claimant was unmarried and had no children under sixteen years of age at the time of the accident, and his rate of pay would bring him within the minimum allowance of Seven and 50/100 Dollars (\$7.50) per week compensation. As no compensation is payable for the first week's disability, when such disability is for a period of less than 30 days, an award can be allowed herein for only one week.

An award is hereby made in favor of claimant on the basis of Seven and 50/100 Dollars (\$7.50) per week for one week's disability from January 7, 1936 to January 15, 1936 in the sum of Seven and 50/100 Dollars (\$7.50) in full satisfaction for injuries growing out of said accident.

This award being subject to the provisions of an Act entitled, "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," approved July 3, 1938 (Sess. Laws 1938 p. 83), and being, by the terms of such Act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from said appropriation from the Road Fund in the manner provided for in such Act.

(No. 3342—Claim denied.)

HERMAN PERRY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 15, 1939.

HARRIS B. GAINES, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MUEHL, Assistant Attorney General, for respondent.

PERSONAL INJURY—*inmate of State penal institution—negligence of employees of—State not liable for.* The State in the maintenance and operation of its penal institutions is engaged in a governmental function and is not liable for injuries to inmates occasioned by the wrongful or negligent conduct of its officers, agents or employees.

MR. JUSTICE YANTIS delivered the opinion of the court:

On October 5, 1933 claimant became an inmate of the Illinois State Prison at Joliet, Illinois. On October 19, 1935 while on the prison grounds he was struck by some railway

cars that broke loose and ran down grade on a prison track. His complaint alleges that by such accident he suffered a broken left leg, his forehead was cut and injured, his side and back were injured and that he received internal injuries, all of which have left him permanently crippled.

The Attorney General has filed a motion to dismiss the complaint for the reason that same does not state any matters upon which an award could be based.

It is the established law and this court has many times held that,

"The State in the maintenance and operation of its penal institutions, is engaged in a governmental function and is not liable for injuries to inmates occasioned by the wrongful or negligent conduct of its officers, agents, servants or employees."

Schaeffer vs. State, 9 C. C. R. 94;

White vs. State, 9 C. C. R. 259;

Monohan vs. State, No. 3057, C. of C. (Unpublished.)

The complaint also recites that claimant was paroled from said Institution on the day of the injury. The question of when he was paroled is immaterial to the decision in the case as the rule would apply in any event. The complaint is dismissed.

(No. 3340—Claim denied.)

JOHN W. HAASE, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 15, 1939.

TRIMBORN & BABB, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

NEGLIGENCE—Illinois National Guard—State not liable for negligence of officers or members of. The State is not liable for the negligence or wrongful conduct of the officers or members of the Illinois National Guard, and cannot be held to respond in damages for personal injuries or property damage, occasioned as the result thereof.

MR. JUSTICE YANTIS delivered the opinion of the court :

Claimant was involved in an automobile accident on July 27, 1938 on Mannheim Road near Touhy Avenue in Cook County. His complaint recites that while exercising all due care and caution for his own safety and that of others lawfully upon the highway, one Fred Bowen then operating a

State-owned truck assigned to the State Military Division, so carelessly, negligently and unlawfully operated such truck that he caused same to collide with claimant's car. That as a result of such accident claimant suffered cuts, bruises and broken bones and was unable to attend to his duties for a period of nine weeks for which he expended Fifty (\$50.00) Dollars for medical treatment and lost Five Hundred Eighty-five (\$585.00) Dollars in wages; further, that his motor vehicle was damaged to the extent of One Hundred Ninety (\$190.00) Dollars; that said accident was caused by said Bowen failing to come to a full and complete stop at the stopsign then and there erected at the crossing at Mannheim Road, and because said truck was traveling at a high and dangerous rate of speed and being then and there operated with faulty brakes.

The Attorney General has filed a motion to dismiss the complaint because same is predicated upon alleged negligent and wrongful conduct of an agent or servant of respondent, and that there is no law by which the latter could be held to respond in damages for the negligent and tortious acts of such agent or servant. The law has been definitely settled and this court has frequently held that,

"In the organization, maintenance, operation and training of the Illinois National Guard the State is engaged in a governmental function and is not liable for the negligent or wrongful acts of its officers, agents, servants, employees or members of the Illinois National Guard."

Peterson vs. State, 8 C. C. R. 9;

Curry vs. State, 9 C. C. R. 6.

No recovery could be authorized upon the facts stated in the complaint and the motion of the Attorney General is therefore hereby allowed. Claim dismissed.

(No. 3302—Claimant awarded \$1,758.42.)

HAROLD GLICK, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 15, 1939.

REGINALD C. HARMON, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—when award for total loss of use of eye may be made under. Where it appears, that claimant, an electrician in the

employ of State sustained accidental injuries, arising out of and in the course of his employment, while engaged in extra hazardous employment, resulting in total loss of use of eye, an award for compensation may be made, in accordance with provisions of the Act, upon compliance with the terms thereof.

SAME—employee returning to work after injury—when award may be made for total temporary incapacity notwithstanding. Employee is entitled to award for total temporary incapacity for periods after returning to work, between surgical operations which he was obliged to undergo, in order to cure or relieve his injuries, during which times he was as a result disabled from working, and to hold otherwise would discourage injured employees from returning to work.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim was filed July 21, 1938, seeking an award of \$1,800.00, under the Workmen's Compensation Act for the loss by claimant of the use of his right eye.

From June 8, 1935 to the date of filing of the claim, claimant was a regular employee of respondent at the University of Illinois where he was classified as a certified electrician. He had previously been employed at irregular intervals at the University since October, 1920.

On November 1, 1937 at about 11:30 A. M. claimant was engaged in taking down some wire which held curtains on a temporary stage at the skating rink at the University of Illinois. While standing on a ladder to cut the wire, one end flew back striking him in the right eye. Immediate notice was given to his employer and he was furnished hospital and medical service to the amount of \$477.40, which was paid by respondent.

Dr. J. Howard Beard testified that he examined claimant on the day of the accident and repeatedly thereafter, and that from the standpoint of industrial vision claimant's eye is a total loss.

Dr. Hanby L. Ford, an Eye, Ear, Nose and Throat Specialist, located in Champaign, Illinois, testified that he performed an operation on claimant's eye on November 9, 1937 and removed the lens of the eye; that on January 7, 1938 he performed a discission on the eye and on February 3, 1938, a subsequent discission; that from an industrial visional efficiency standpoint a one-hundred (100) per cent loss has been sustained by claimant to the eye in question and this condition is permanent.

Claimant testified that in standing before a window he could distinguish between light and dark but can see no objects with the right eye.

Following the accident claimant resumed work on January 17, 1938 and continued through February 2, 1938. He was then forced by his injury and the surgical care of the eye to discontinue work until March 21, 1938, from which date he worked steadily until the filing of his complaint. He lost eighty-seven and one-half ($87\frac{1}{2}$) days of work and he received pay in the sum of Two Hundred Fifty-nine and $48/100$ (\$259.48) Dollars. He prays an award for specific total loss of use of the right eye under the terms of the Workmen's Compensation Act, in the sum of One Thousand Eight Hundred (\$1,800.00) Dollars, and represents that the payment of Two Hundred Fifty-nine and $48/100$ (\$259.48) Dollars was for thirty-one (31) days, leaving temporary total compensation due him for fifty-six and one-half ($56\frac{1}{2}$) days.

The Attorney General contends that under a proper construction of the language of the Supreme Court in the case of *Western Cartridge Co. vs. Ind. Comm.*, 357 Ill. 29, claimant would not be entitled to temporary total disability payment for the full period of eighty-seven and one-half ($87\frac{1}{2}$) days of work which he lost, because he returned to work on January 17, 1938, and that the later period of absence from work cannot be counted as a period of temporary total incapacity, under the theory that any disability after his return to work must be classified as either partial or total permanent disability and not as a part of his temporary disability; that the period of temporary total incapacity is that temporary period immediately after the accident, during which the injured employee is totally incapacitated for work by reason of the illness attending the injury. That such time may be described as the period of the healing process.

The court agrees with counsel for claimant that the latter should not be denied any part of the temporary total disability that is due him for the period of his enforced inability to work, by reason of the fact that he attempted to work during the periods between his operations. Any other interpretation of the law as it applies to the facts in this case would tend to discourage an injured employee from going back to work, as he would be discouraged by the fear of denial

of the right of recovery in the event that he was unable to continue to work permanently.

Claimant had been employed by respondent for more than one year prior to the accident and his earnings were One Hundred Eighty (\$180.00) Dollars per month. He had a wife but no children under the age of sixteen (16) years.

The amount of compensation which should be payable to the employee for an injury not resulting in death, is, under the provisions of *Section 8 (b)* of the *Act*, limited to Fifteen (\$15.00) Dollars per week where there is no child under the age of sixteen (16) years at the time.

His period of temporary total disability was apparently fourteen (14) weeks three and one-half ($3\frac{1}{2}$) days, for which he would be entitled to Two Hundred Eighteen (\$218.00) Dollars. As he was paid Two Hundred Fifty-nine and $48/100$ (\$259.48) Dollars, there has been an overpayment to him of Forty-one and $48/100$ (\$41.48) Dollars.

"The amount of overpayment for temporary total disability is allowable as a credit to the employer when called upon to pay specific loss for partial or total permanent disability."

Black vs. State, No. 3108, Court of Claims Opinion, rendered May 10, 1938;

Johnson vs. State, No. 2906, Court of Claims Opinion, rendered November 16, 1938.

"The amount of compensation which shall be paid to the employee for an injury not resulting in death shall be:

"For the loss of the sight of an eye, or for the permanent and complete loss of its use, fifty per centum of the average weekly wage during one hundred and twenty weeks."

Section 8 (c-16), Workmen's Compensation Act.

Under the facts appearing herein an award is hereby approved in favor of claimant for specific loss of use of his right eye, in the sum of One Thousand Eight Hundred (\$1,800.00) Dollars, minus Forty-one and $48/100$ (\$41.48) Dollars, or One Thousand Seven Hundred Fifty-eight and $52/100$ (\$1,758.52) Dollars.

This award would be payable at the rate of Fifteen (\$15.00) Dollars per week, but payment for seventy-one (71) weeks has accrued to March 13, 1939, making the sum of One Thousand Sixty-five (\$1,065.00) Dollars payable at the present time, the balance of Six Hundred Ninety-three and $52/100$ (\$693.52) Dollars is payable in forty-six (46) weekly amounts of Fifteen (\$15.00) Dollars each, commencing March 20, 1939, and one final payment of Three and $52/100$ (\$3.52) Dollars.

This award being subject to the provisions of an Act entitled, "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," Approved July 3, 1938 (Sess. Laws 1938 p. 83), and being by the terms of such Act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from said appropriation from the General Revenue Fund in the manner provided for in such act.

(No. 3121—Claimant awarded \$775.14.)

ROLLA TIPSORD, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 15, 1939.

JAMES A. LIGHT, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*period of temporary total incapacity may exist though employee at work.* Where employee of State sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra hazardous employment, and returns to work immediately thereafter, and continues at work for several months and receives regular salary, although he is unable to, and does not perform his duties, by reason of injuries received in accident, it can be said that he was totally, temporarily disabled, and such payments of salary may be considered as payments on account for temporary total incapacity and do not necessarily constitute a bar to claim for compensation for such disability, where it is shown to exist after employment ceases.

SAME—*when award may be made under.* Where employee of State sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra hazardous employment, an award for compensation for same may be made in accordance with provisions of Act, upon compliance with terms thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks an award of Nine Hundred Sixteen (\$916.00) Dollars for accidental injury sustained while employed by respondent. On September 24, 1936 he was employed by the Division of Highways in highway improvement work on State Aid Route No. 11 near Saybrook, Illinois. While assisting in the construction of a concrete erosion wall, claimant's left hand was caught between a large stone and the wall and the first phalanx of the index finger of the left

hand was crushed. He was immediately taken by his foreman to Dr. James Jensen at Saybrook who dressed the finger and put it in a splint. The doctor at that time stated to claimant that in his opinion the end of the finger would have to be amputated, but claimant postponed any such act because of the hope that treatment might heal the finger without his suffering loss of time or wages, as would be the case if the finger was amputated. Claimant continued to report for duty until November 14, 1936 at which time the work at Saybrook was discontinued and claimant was released. As claimant's finger did not heal he complained to the Highway Division in January, 1937 and arrangements were made for him to be taken to Chicago to Dr. H. B. Thomas. The latter, on March 11th, examined claimant's finger and reported that he had an open osteomyelitis of the bone, service connected. The X-ray showed two sequestra which should be removed. On April 19th claimant was again taken to Dr. Thomas and he was operated on, and the fragments of bone and the balance of the first phalanx of the injured finger were removed. He remained at St. Luke's Hospital until April 21st. He remained in Chicago until April 23rd and again returned to Chicago on April 28th and remained there until May 2nd. He again returned to Chicago June 3rd and was treated by Dr. Thomas until June 14, 1937, when Dr. Thomas reported the injury had reached a permanent stage. The Division of Highways has paid the following bills in connection with claimant's treatment:

| | |
|---|----------|
| Dr. James Jensen | \$ 29.50 |
| Dr. H. B. Thomas..... | 141.00 |
| St. Luke's Hospital | 19.50 |
| Mrs. Lizzie Tipsord and Rolla Tipsord, board and lodging... | 21.05 |

\$211.05

Claimant had not been employed by respondent for a period of a full year prior to the accident, and as an extra man his wage for compensation purposes would be on the basis of two hundred (200) working days per year. It is stipulated that his average weekly wage was Fifteen and 38/100 (\$15.38) Dollars. Claimant at the time of the accident was the father of eight children all under the age of sixteen years, and they and their mother were living with the claimant and dependent upon him for support. Any compensation

due him therefore will, under the provision of Section 8 (j-2) of the Workmen's Compensation Act, be on the basis of a minimum allowance of Fourteen (\$14.00) Dollars per week. Under Section 8 (e-2) if claimant had suffered the entire loss of the first finger he would be entitled to Fourteen (\$14.00) Dollars per week for a period of forty (40) weeks. Under Section 8 (e-17) he would be entitled to such proportion of forty (40) weeks as the proportion of loss or loss of use of such index finger bears to total loss. Under Section 8 (e-6) the loss of the first phalange of a finger is considered the loss of one-half thereof.

There is no question from the record but what claimant is therefore entitled to an award for the loss of the first phalange of said finger. In considering the testimony relative thereto, we find that the evidence all supports in addition to the loss of the first phalange, further disability to the finger by reason of the resulting stiffness in the middle joint. The evidence therefore supports a finding of seventy-five (75) per cent loss of use of such index finger.

We therefore find that claimant is entitled to an award on the basis of Fourteen (\$14.00) Dollars per week for thirty (30) weeks, for seventy-five (75) per cent loss of use of such finger, in the total sum of Four Hundred Twenty (\$420.00) Dollars.

In his complaint claimant also seeks an award for Fourteen (\$14.00) Dollars per week for nineteen (19) weeks temporary total disability, and Four and 50/100 (\$4.50) Dollars per week for twenty (20) weeks temporary partial disability, and acknowledges that respondent has paid him on account of this claim the sum of Eighty-two and 14/100 (\$82.14) Dollars from April 18, 1937 to June 14, 1937.

The proof discloses that respondent paid temporary total disability at the rate of Eleven and 22/100 (\$11.22) Dollars per week from April 18, 1937 to June 19, 1937, amounting to Ninety-two and 96/100 (\$92.96) Dollars.

This case presents a peculiar situation. After having his hand dressed the day of the accident September 24, 1936, claimant returned to work and continued to be employed until November 4, 1936. During this time he was paid full wages but testified that he did not work after the first fifteen minutes, because he was unable to handle a spade and do the required work; that he was kept on the payroll until his crew

was laid off, and that during the last three weeks before the job was finished he was not there half of the time, because he was at home and at the doctor's office suffering with pain from his injured finger (Transcript p. 21). Claimant was unable to work from November 1, 1936 to April, 1937. On April 6, 1937 claimant was put on WPA work and was paid for six days. Apparently claimant did no work during these six days but drew one pay check, and according to the testimony in the record (Transcript p. 22), such check was just another form of relief so far as claimant was concerned. In February, 1937 claimant was sent to Chicago to be examined by Dr. Thomas. His examinations, treatments and operations continued under the care of Dr. Thomas during which time he stayed in Chicago for several days at a time, returning to Chicago on June 2, 1937 and again later in June. He was discharged by Dr. Thomas on June 14, 1937, with a notation that the finger had reached a permanent stage. During all of the period following the injury on September 24, 1936 to March 11, 1937 claimant's injured finger was draining and chunks of bone were loosening therefrom. After Dr. Thomas discharged claimant on June 14, 1937 his finger continued to drain until about April 10th, but Dr. Thomas' report stands that the injury had reached a permanent condition on June 14, 1937.

Counsel for respondent contends that no award for temporary total disability should be allowed, because claimant was employed and continued to work immediately following the injury and continuously thereafter for over a month, until November 4, 1936. We do not construe the provisions of Section 8 (b) of the Workmen's Compensation Act as meaning that in order to pay under the temporary total incapacity provision of such Act that such temporary total incapacity must start immediately following the accident and be continuous thereafter. It is true that the latter part of such provision reads as follows:

"Provided, that in the case where the temporary total incapacity for work continues for a period of more than thirty days from the day of the injury, compensation shall commence on the day after the injury."

but the intention of this proviso is only for the purpose of allowing compensation for the first six working days in those cases where the disability is serious enough to last for an extended period of time. An injured person might attempt to

work for several days before the effects of his injury would become apparent or develop in seriousness to such an extent that he would be compelled to cease his labor, but in such case the employee would still be entitled to the benefits of the Compensation Act. As to how much time may elapse between the injury and the commencement of temporary total disability, we do not feel called upon to state, as the facts in each case would be material.

In the *United Airlines* case, 265 Ill. 346 the temporary total disability started August 28, 1933, while the injury was incurred April 30, 1932, a period of approximately sixteen months. The term "temporary total incapacity" is used to indicate a preliminary stage of relief or aid for an employee, prior to the time when his injuries may have resulted in a permanent condition of disability. It is sometimes described as the "healing period" or the time during which medical treatment is given to cure or relieve the injured employee from the effects of his injury.

In the case of *Mt. Olive Coal Co. vs. Ind. Comm.*, 295 Ill. 429, the court said:

"The period of temporary total incapacity is that temporary period immediately after the accident during which the injured employee is totally incapacitated for work by reason of the illness attending the injury. It might be described as the period of the healing process. 'Temporary' as distinguished from 'permanent' disability is a condition that exists until the injured workman is as far restored as the permanent character of the injuries will permit."

The foregoing statement contains a possible contradiction for it uses the phrase "the period immediately after the accident," and then describes the period of temporary disability as being that of the healing period during which the injured workman is being restored as far as the permanent character of his injury will permit.

We believe that proper cases may exist where the temporary total disability may not commence immediately after the injury, and that the facts in the present case bring it within such a class. The injured condition of claimant's finger was certainly of a temporary character until after the operation, and the fact that he was kept on the payroll while he performed no labor, justifies treating such pay as was given to him during that period, as compensation rather than wages. However, even had he performed some work up to November 4, 1936, and then because of the serious condition

of his finger, been compelled to cease work, he would still, in the opinion of the court, be entitled to compensation for temporary total disability for any compensable time up to the operation that was performed by Dr. Thomas and the claimant's discharge by the latter.

In the case at bar we have an employee who was kept on the payroll, but who apparently performed no remunerative work from the time of his injury on September 24, 1936 until November 4, 1936. He was unemployed from the latter date until June 14, 1937 when his injury was pronounced by the surgeon in charge as having reached a permanent stage in development. During this latter period he was again paid for six days non-productive time by the WPA in April, 1937.

We find that his account should be figured as follows:

| | |
|---|----------|
| 57 weeks and 4 days temporary total disability, commencing September 24, 1936, at \$14.00 per week..... | \$525.00 |
| Deduction for amount paid for non-productive time..... | 169.86 |

| | |
|---|----------|
| Total allowance for temporary total disability..... | \$355.14 |
| An award is therefore hereby made in favor of claimant for 75 per cent loss of use of the index finger of his left hand, in the sum of..... | 420.00 |
| A further award is hereby allowed for temporary total disability due claimant in the sum of..... | 355.14 |

The above awards would be payable on a weekly basis of Fourteen (\$14.00) Dollars per week, but as the entire amount has heretofore accrued, the above items are payable at the present time.

This award being subject to the provisions of an Act entitled, "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," approved July 3rd, 1938 (Sess. Laws 1938 p. 83), and being, by the terms of such Act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from said appropriation from the Road Fund in the manner provided for in such Act.

(No. 3198—Claimant awarded \$2,674.35.)

MILDRED MCWHIRTER, Claimant, v. STATE OF ILLINOIS, Respondent.

Opinion filed March 15, 1939.

ALFRED S. PFAFF, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—death of employee from injuries within provisions of—when award for partial dependency may be made under. Where it appears that employee of State sustained accidental injuries resulting in his death, arising out of and in the course of his employment, while engaged in an extra hazardous employment, leaving a dependent daughter to whose support he regularly contributed a large part of his salary, and who received about two thirds of her living therefrom, an award for compensation for such death, may be made to such daughter, for partial dependency, in the amount provided in the Act, upon compliance with the terms thereof.

Mr. Justice YANTIS delivered the opinion of the court:

Joseph Sullens was employed at the State School and Colony, operated by the State of Illinois at Lincoln, from and after October 9, 1933. On or about the 15th day of January, 1937 he was employed as a general handy-man being classified as a plasterer's helper, his duties being plastering, minor carpentering and minor repair work about the buildings of the institution. In the carpenter shop there are power band and cross-cut saws, planers, jointers, lathes, drill presses and mortising machines, and in the machine shop there are power driven presses, lathes and other machinery. On or about the 15th day of January Mr. Sullens, while passing from one building to another on the grounds of the institution, in the course of his duties, slipped and fell on the ice. He struck the back of his head on the cement sidewalk and immediately thereafter complained to one of his fellow employees. He reported his accident to Mr. Fred H. Mahler under whom he worked. A day or two after the accident the latter noticed that Mr. Sullens was acting in a strange manner and his mind seemed to be wandering. A fellow employee, Mr. Alf L. Niemberg, saw Mr. Sullens fall and strike his head. Frequent headaches resulted and in a few days he was removed to the institutional hospital. He left the hospital on two different occasions but it was necessary to return him to the hospital each time, and he died there on the 7th day of February, 1937. From the evidence in the record it satisfactorily appears that his death was the *result* of the *injuries* which he sustained on January 15th as aforesaid.

His salary at the time of his death was Sixty (\$60.00) Dollars per month with an additional maintenance allowance of Twenty-four (\$24.00) Dollars per month. He

received his full pay for the month of January, 1937 and for six days in February, 1937. The last check was for Twelve and 68/100 (\$12.68) Dollars which was forwarded to the claimant herein as the Administratrix of his Estate. Notice of claim for compensation was made within six months and the claim was filed herein on February 3, 1938. He left surviving as his only heir at law, his daughter, Mildred McWhirter, claimant herein. Before Mr. Sullens became employed by the State he lived on a sixty-acre farm which he owned in Marion County, Illinois. His daughter, son-in-law and their daughter resided with him. The son-in-law is ruptured and does light work about the farm. Their daughter is eighteen years of age and is unemployed. The farm is improved with a three-room dwelling, barn and granary. There are ten (10) acres of pear trees, about twenty-five (25) acres of farm land and the balance is rough pasture and timber. They obtained no crops off the land between October, 1933 and January, 1937 except to aid in feeding four horses, three cows and the chickens. There is a mortgage on the land of approximately \$1,000.00 now past due. During the past several years the family received some drouth relief in connection with the operation of the farm. The employee, Sullens, from month to month sent approximately all of the cash wages received by him home to his daughter and this money was spent for the living expenses of herself, husband and daughter, and for the payment of the taxes and interest on the mortgage. The record shows that claimant herein received two-thirds of her living from the proceeds of her father's salary. The family was never on relief at any time during the five years preceding the father's death, but has been receiving relief since that time. The deceased employee left no life insurance, and at the time of the hearing the funeral bills had not been paid.

The court finds that under the evidence herein appearing, the deceased employee and respondent were operating under the terms of and were bound by the provisions of the Illinois Workmen's Compensation Act; that said employee suffered an accident which arose out of and in the course of his employment and as a result of which he died. That due notice and application for payment of compensation have been given and requisite claim filed. That under the provisions of Paragraph (c), Section 144, Chapter 48, Ill. Revised Statutes, 1937, and under the facts appearing in the record, claimant

is entitled to an award for partial dependency on a proportionate basis of two-thirds of the total sum allowable.

"If no amount is payable under paragraph (a) or (b) of this Section (7) and the employee leaves any * * * child * * * who at the time of the injury was partially dependent upon the earnings of the employee, then such proportion of a sum equal to four times the average annual earnings of the employee as such dependency bears to total dependency, but not less in any event than \$1,000.00 and not more in any event than \$3,750.00."

(Sec. 7 (c) *Workmen's Compensation Act*.)

Joseph Sullens' monthly wage should be computed on the basis of Eighty-four (\$84.00) Dollars per month, or One Thousand Eight (\$1,008.00) Dollars per year. Applying the above rule an award is due in the present case of Two Thousand Six Hundred Eighty-eight (\$2,688.00) Dollars. The average weekly wage would figure Nineteen and 38/100 (\$19.38) Dollars and any award payable hereunder would be on the basis of fifty (50) per cent thereof, or Nine and 69/100 (\$9.69) Dollars per week. The accident in question occurred January 15, 1937 and payments have accrued for a period of one hundred twelve (112) weeks to March 12, 1939, resulting in an earned award to the latter date of One Thousand Eighty-five and 28/100 (\$1,085.28) Dollars, less \$13.65 heretofore paid for unproductive time, making \$1,071.63 due at this time; and future monthly payments on the basis of Nine and 69/100 (\$9.69) Dollars per week for one hundred sixty-five (165) weeks commencing March 19th and one final payment of Three and 87/100 (\$3.87) Dollars, making total deferred payments in the aggregate sum of One Thousand Six Hundred Two and 72/100 (\$1,602.72) Dollars.

An award is therefore hereby entered in favor of Mildred McWhirter, Petitioner herein, as the partially dependent daughter of Joseph Sullens for the sum of Two Thousand Six Hundred Seventy-four and 35/100 (\$2,674.35) Dollars payable as follows:

\$1,071.63, payable at the present time;

1,598.85, payable hereafter on the weekly basis of \$9.69 per week for 165 weeks; and

3.87, final payment.

This award being subject to the provisions of an Act entitled, "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," approved July 3, 1938 (Sess. Laws 1938 p. 83), and being, by the terms of such Act, subject

to the approval of the Governor, is hereby, if and when such approval is given, made payable from said appropriation from the General Revenue Fund in the manner provided for in such Act.

(No. 2588—Claimant awarded \$384.72.)

ORAL CASEY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 15, 1939.

CHARLES R. MEYERS, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award for compensation under Act be made.* Where employee sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra hazardous employment, an award for compensation for such injuries may be made, in accordance with the provisions of the Act, upon claim made and application filed for same, within time required therein.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

The claimant, Oral Casey, has been in the employ of the respondent as a member of the Highway Maintenance Police since April 4, 1933. On July 31st, 1934, while on his way to drill and inspection at Mt. Vernon, his motorcycle collided with a truck driven by one Robert Hale, at a highway intersection on S. B. I. Route 142, about a mile north of Mt. Vernon. Claimant was traveling about forty-five miles per hour, and the accident appears to have resulted from the fact that the truck which was traveling down a slight incline had no brakes, and the driver was unable to control the same. As the result of such collision the claimant sustained a fracture of the lower jaw, a fracture of the skull, an injury to his wrist, a large laceration of the thigh, and numerous other lacerations about his face and body. He was confined to the hospital for fifty-one (51) days, and returned to his work on January 14th, 1935.

All necessary first aid, medical, surgical and hospital services were furnished and paid for by respondent, the bills therefor aggregating \$1,830.00. Claimant makes no claim for any permanent disability, but asks for compensation for dis-

figurement of his head and face. He submitted to an examination by the court, and from such examination and the testimony in the record, it appears that he has an irregular scar on his right forehead about two inches in length and a similar scar on the right side of his face about two inches long, extending from a point about one and one-quarter inches backward from the outer edge of the right eye, in a vertical direction toward the center of the face.

During the time he was off work as aforesaid, he received his regular salary of One Hundred Fifty Dollars (\$150.00) per month.

Claimant is a married man and had one child under the age of sixteen years at the time of the accident.

There is no question but what claimant and respondent, at the time of the accident, were operating under the provisions of the Workmen's Compensation Act, and the only question in the case is the nature and extent of the injuries sustained, and the amount of compensation to be paid therefor.

Upon a consideration of the evidence, we find that the claimant was temporarily totally disabled from the date of the injury to January 14, 1935, to wit, 23-5/7 weeks, for which he is entitled to receive compensation under the provisions of Section 8, paragraph (b) of the Workmen's Compensation Act, at the rate of Fifteen Dollars (\$15.00) per week, to wit, the sum of Three Hundred Fifty-five Dollars and Seventy one Cents (\$355.71).

We further find that as the result of the accident in question, the claimant has sustained a serious and permanent disfigurement to the head and face, and that he is entitled to receive compensation therefor under the provisions of Section 8, paragraph (c) of the Workmen's Compensation Act in the sum of Eight Hundred Fifty Dollars (\$850.00); such compensation also being payable in weekly installments of Fifteen Dollars (\$15.00) per week.

We further find that the claimant has received of the respondent the sum of Eight Hundred Twenty Dollars and Ninety-nine Cents (\$820.99) to apply on the compensation due him as aforesaid. Deducting the amount paid by the respondent from the total amount of compensation to which claimant is entitled as above, to wit, Twelve Hundred Five Dollars and Seventy-one Cents (\$1,205.71), leaves a balance of compensa-

tion due the claimant in the sum of Three Hundred Eighty-four Dollars and Seventy-two Cents (\$384.72).

The entire amount of such compensation having accrued at this time, an award is hereby entered in favor of the claimant for the sum of Three Hundred Eighty-four Dollars and Seventy-two Cents (\$384.72).

This award being subject to the provisions of an Act entitled "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," approved July 3d, 1937 (Session Laws 1937, p. 83) and being by the terms of such Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided for in such Act.

(No. 3339—Claim denied.)

EMILE A. COTE, ET AL., Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 16, 1939.

WM. H. FISCHER, for claimants.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

SALARY—when claim for will be denied. Where complaint, on its face, in claim for salaries shows that claimants each received their respective salary in full, on the basis of the amount fixed in the statute providing for the appointment of claimants and fixing their salaries, no grounds are shown to justify an award for further salary, and an award must be denied.

SAME—court reporters—Act providing for appointment and fixing salaries amendment thereto, reducing salaries—when claim will not lie for difference. Where court reporters are appointed under statute, providing for such appointments and fixing salaries therefor and Act is subsequently amended, reducing salaries, which reduced salaries are paid and accepted by claimants, no claim will lie for difference between amount fixed in Act and amendment thereto.

MR. JUSTICE YANTIS delivered the opinion of the court:

Twenty-seven claimants join in presenting this claim and allege in substance that they were for various periods set forth in the complaint, between January 1, 1934 and December 30, 1938, duly appointed official Shorthand Reporters in Circuit, Superior and City Courts of Illinois, whose salaries were payable by the State.

That on the 21st day of June, 1933 the General Assembly of the State of Illinois enacted a law providing for their appointment and fixing the salaries at the sum of Three Thousand Six Hundred (\$3,600.00) Dollars each per annum, said Act to take effect on January 1, 1934.

That from and after January 1, 1934 salaries have been paid to the respective claimants and to Robert M. Ramsey, now deceased, for whom Jennie E. Ramsey, Executrix, joins herein, on the basis of Three Thousand Two Hundred Forty (\$3,240.00) Dollars per annum, and that there remains due and owing to each of claimants, the sum of Thirty (\$30.00) Dollars per month for the respective periods shown in said complaint, twenty-one of said claimants seeking \$1,800.00 each, one seeking \$210.00, one \$1,470.00, another \$643.00, another \$1,530.00, one \$1,710.00 and two other \$1,600.00 each.

The claimants base their contention on the averment that they were entitled to salary at the rate of \$3,600.00 per year and that they were paid on the basis of \$3,240.00 per year.

The Attorney General has filed a motion to dismiss said complaint for the reason that the correct salary to which the respective claimants were entitled during said period was in fact \$3,240.00 per annum, and as the complaint shows that they have each received the full amount of their salary on the basis of said sum of \$3,240.00 per annum, said complaint should be dismissed.

Prior to the 58th General Assembly, Section 156 of Chapter 37 being Section 2 of "An Act to Authorize the Judges of Circuit, Superior and City Courts to Appoint Shorthand Reporters" etc., in force June 1, 1929, contained a provision that such reporters in Circuit and Superior Courts and in City Courts in cities having a population of fifty thousand or more should receive out of the State Treasury of this State, an annual salary of \$3,600.00, payable monthly on the warrant of the Auditor of Public Accounts, out of any money in the State Treasury not otherwise appropriated. Said Act further provided that each reporter in City Courts in cities of less than fifty thousand population should receive and be paid out of the County Treasury \$10.00 per diem for each day his court is in session. A further provision in said Act then recited that the presiding judge in such City Court should furnish to such Reporter *at the close of each term of Court a Certificate showing the amount of per diem due him.*

Two amendments were made to said Section 2 by the 58th General Assembly. One amendment originated in the Senate and one in the House. Under the terms of Senate Bill No. 98 the provision that the Judge's Certificate should be furnished to the Reporter *at the close of each term of Court*, was changed to read that the presiding judge in such City Court (in Cities of less than fifty thousand population) shall furnish to such reporter "*on the first day of each calendar month*," a certificate showing the amount of per diem due him, etc. This was the only material change made by said bill.

The other amendment was under House Bill No. 19 and the only change made by it was the substitution of the figures "3240" for the previous figures of "3600," so that said Act should read, "Said reporters * * * shall receive and be paid out of the State Treasury * * * *an annual salary of \$3,240.00.*"

Senate Bill No. 98 was introduced January 4, 1933,

Senate Bill No. 98 was passed May 24, 1933,

Senate Bill No. 98 was approved June 21, 1933, and by its terms became effective January 1, 1934. (Sess. Laws 1933, p. 461.)

House Bill No. 19 was introduced January 10, 1933,

House Bill No. 19 was passed June 2, 1933,

House Bill No. 19 was approved June 3, 1933, and by an emergency clause became effective immediately. (Sess. Laws 1933, p. 463.)

Each of said bills repeated the language in full of Section 2 as it then read with the exception of the specific change proposed, and both were therefore in compliance with the provisions of *Section 3 of Article 4 of the Constitution of Illinois of 1870* which provides,

"No law shall be revived or amended by reference to its title only, but the law revived, or the section amended, shall be inserted at length in the new Act."

The Senate Bill was introduced first and was passed first. The House Bill was approved first and by its emergency clause became effective immediately, while the amendment under Senate Bill No. 98 did not become effective until January 1, 1934, but both were passed at the same session of the 58th General Assembly of 1933.

To determine the effect of more than one amendment to a particular section at the same session, all such amendments must be read together and the changes made by each shall be given effect unless the changes are inconsistent.

"In construing an Act of the legislature, the title of the Act, the objects to be accomplished, the other provisions found in connection with those under special consideration, the provisions and arrangement of the statutes which were amended, the mode in which the amendment was introduced, as shown by the Journals and records, and the history of the legislation, may all be considered."

People vs. Lloyd, 304 Ill. 23.

The presumption is that different Acts of the legislature, passed at the same session thereof, are imbued by the same spirit and actuated by the same policy, and that one was not intended to repeal or destroy another, unless so expressed. Statutes enacted at the same session of the legislature should receive a construction if possible which will give effect to each. Each is supposed to speak the mind of the same legislature, and the words used in each should be qualified and restricted, if necessary, in their construction and effect, so as to give validity and effect to every other Act passed at the same session.

In the case of *Hutchinson vs. Self*, objections had been filed to the rendition of judgment for delinquent taxes levied for the payment of interest on railroad aid bonds issued by the town of Waverly. It appeared that the Act incorporating the railroad company in question became a law on April 23, 1867, and the town of Waverly became incorporated by a special charter two days later, April 25, 1867. In considering the powers of the town of Waverly, the court said:

"The Act incorporating the railroad company and the one incorporating the town were passed at the same session. The former made provision for conferring this power (to issue bonds in aid of railroads) on towns thereafter to be incorporated as well as those already incorporated, and when the latter Act was passed incorporating the town said Act became clothed with the additional power as fully as if it had been expressly embraced in its charter. The two Acts must be construed together, and when so construed there is no repugnancy between them."

Hutchinson vs. Self, 153 Ill. 542.

When one considers the provisions of Senate Bill No. 98 and House Bill No. 19 above mentioned and the fact that they were being concurrently considered in the House and the Senate respectively at the same time, it becomes apparent that the intention of the legislature was to amend the statute relative to the payment of official court reporters in two respects and in two respects only, i. e. that for those who were serving in City Courts in cities of less than fifty thousand population the presiding judge of such court should issue a

certificate to the reporter on the first day of each calendar month, showing the per diem due such reporter, instead of at the close of each term as previously fixed by statute, and that the salary of court reporters in Circuit and Superior Courts and in City Courts of cities of over fifty thousand population, that the annual salary should be reduced from \$3,600.00 to \$3,240.00. To make such latter change definitely effective before January 1, 1934, an emergency clause was attached to said House Bill No. 19 and it became effective on approval by the Governor on June 3, 1933.

As the complaint herein shows upon its face that claimants have each received their respective salaries in full on the basis of the statutory amount of \$3,240.00 per year, such claim fails to set forth any ground for further award, and the motion of the Attorney General should be allowed.

The motion to dismiss the claim is allowed and the claim as to each of said claimants is dismissed.

(No. 2578—Claim denied.)

CHARLES M. THOMSON, AS TRUSTEE OF THE ESTATE OF CHICAGO AND EASTERN ILLINOIS RAILWAY COMPANY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 25, 1939.

THOMAS N. COOK, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

RAILROAD FARE—when claim for must be denied. Where it appears that claim for railroad transportation furnished by railway company to nurse has and had no legal validity, court has no jurisdiction to entertain same, and award must be denied.

MR. JUSTICE LYNESCOTT delivered the opinion of the court:

The claimant in this case, Charles M. Thomson, as Trustee of the Estate of Chicago and Eastern Illinois Railway Company, filed his claim with the clerk of this court against the State for the sum of \$10.98, which is one-half transportation furnished to Helen E. Thomas, a registered nurse from West Frankfort, Illinois, to Chicago, Illinois, in August, 1933, as per itemized bill attached to the complaint.

The claimant endeavored to secure payment of these transportation charges from the Department of Health, but was advised by the Director of Public Health that the funds from which transportation charges for trachoma patients were paid, for which the transportation in question was furnished, had been exhausted, and it was necessary for the claimant to file claim with the Court of Claims for payment of these charges.

No question arises about the facts in this case. From an investigation, we find that no funds were allocated to the Department of Public Health for the 1933 biennium from which the expenditures involved in this claim would have been properly payable. While it appears that the charge is just and reasonable, and the services were actually rendered by the claimant, this court has no power or jurisdiction to give validity to a claim that never had any legality.

The claim will, therefore, be dismissed.

(No. 2788—Claim denied.)

EDWIN KRUG, CHESTER STRADER, FRANK POOLE, JOHN A. WILLIAMSON, CHAS. DALTON, E. F. HENDRICKS, BOYD RAINS, HENRY SAMS, GERALD A. DENTON, JOHN L. STRADER, T. H. LIPE, GABE HENSON, CHARLEY GRIGGS, CHARLES SNELL, R. M. JEFFRIES, J. A. LINDSAY, CHARLIE FISHER, HARRY FISHER, WILL MILLER, E. J. McMILLAN AND JOHN C. BISHOP, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed April 11, 1939.

J. KELLY SMITH and M. C. COOK, for claimants.

JOHN E. CASSIDY, Attorney General; GLENN TREVOR, Assistant Attorney General, for respondents.

GOVERNMENTAL FUNCTION. The State in the creation of a fish and game preserve, for the people of the State, is engaged in a governmental function.

NEGLIGENCE—governmental function—State not liable for acts of officers, agents or employees. In the exercise of a governmental function the State is not liable for the negligent acts of its officers, servants or agents, under the doctrine of respondeat superior.

SAME—defective plans for public work—State not liable for damages resulting therefrom. In the making and adopting plans for a public work, the State exercises a governmental function, and is not liable for any damages which may result from defects in such plans.

PROPERTY DAMAGE. Liability of State for damage to property not taken for public use—only under Section 13 of Article 2 of Constitution—claimant must bring self within provision. The only liability of the State for damage to property, not taken for public use is under Section 13 of Article 2 of the Constitution of Illinois and claimant must bring self within provisions of same in order to obtain award.

SAME—same—obstruction of water courses—caused by construction of permanent public improvement—not continuing nuisance permitting successive actions—only one recovery and includes all damages resulting from past, present or future. Where embankment and dam of permanent nature and substantial construction was erected by State, pursuant to lawful authority, and there is no evidence of any negligence in the construction thereof, it is a permanent public improvement, and its construction or maintenance does not constitute a continuing nuisance, permitting successive actions for damages to private property, as the result thereof, but there can only be one recovery, for any such damage, and such recovery includes all damages resulting from the improvement, past, present or future.

SAME—same—same—same—right of action for in owner of land—does not pass to subsequent grantee or tenant. A right of action for damages to private property, not taken for public use, resulting from construction of permanent public improvement, is in the owner of the property at the time of the making of the improvement and subsequent assignees and lessees of the property, take the same as it existed at the time of the conveyance or leasing, and have no right of action for damages resulting from the prior improvement, and accruing thereafter.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On December 28th, 1935 the first thirteen of the above named claimants filed their claims herein. By amendment filed January 15th, 1936, the other claimants, eight in number, were added as parties to this proceeding.

The original complaint, together with the amendment of January 15th, 1936, alleges in substance as follows:

1. That prior to the spring and summer of 1935 the several claimants were in the possession, as tenants, of certain premises on which they were growing corn and other farm products.

2. That in 1921 the Olive Branch Drainage District was organized; that the lands farmed by the several claimants herein drained into the ditches of such District.

3. That the outlet of said Drainage District was into Horseshoe Lake, which was near and adjacent to the land occupied by the several claimants herein; that upon the creation of said Drainage District, the land occupied by the several claimants was drained in and through the channels of

said Drainage District in such manner that the several claimants raised large crops of corn and other farm products upon such land prior to 1935.

4. That during the year 1931 the State of Illinois negligently made and constructed, and have since that date maintained, a large earth and concrete levee, embankment, or dam, with iron screening thereon, across the outlet of said Horseshoe Lake; that since the construction of such levee, embankment or dam, the respondent has maintained a game preserve in said Horseshoe Lake and the land adjacent thereto.

5. That during the year 1935 the several claimants had planted some corn, and were preparing the land for additional planting; that the waters flowing into said Horseshoe Lake and against said dam backed up and overflowed the land of the claimants, and remained on said land in such manner that the corn planted by the claimants was damaged, and that portion of the land which was being prepared for planting became and was unplatable.

6. That in consequence of the negligent construction of the aforementioned embankment or dam across said Horseshoe Lake, the corn planted by the several claimants was greatly damaged and destroyed, and the land which had been prepared for planting was damaged to such extent that the several claimants were unable to produce the usual crop therefrom, whereby the several claimants sustained damages in various amounts, aggregating the total sum of \$18,496.00.

On March 24th, 1938, pursuant to leave of court theretofore obtained, the claimants amended their complaint by striking out the words "negligently," "negligence" and "negligent," wherever such words appeared in the several counts of the complaint.

The case now comes before the court at the conclusion of the claimants' testimony, on the motion of the Attorney General that judgment be entered in favor of the respondent, upon the ground that the evidence in the record does not justify an award in favor of any of said claimants.

The evidence discloses that all of the claimants except T. H. Lipe and R. M. Jeffries, were tenant farmers during the year 1935 and prior years, and that said Lipe and Jeffries owned the farms which they operated.

The damages claimed by all of the claimants except Lipe are for a loss of crops for the year 1935; Lipe claims similar damages for 1935 as well as for 1933 and 1934.

The evidence in the record regarding the dam and embankment in question is somewhat meagre but clearly shows that such dam and embankment extend across the outlet of Horseshoe Lake a distance of about one-eighth of a mile; that the embankment is constructed of earth; that the dam is constructed of concrete, and has iron gates; that it is six and one-half feet high up to the spillway, and has a wire screen three feet high over the spillway; that it was constructed for the purpose of creating a fish and game preserve in Horseshoe Lake.

The original complaint herein, as well as the amendment adding additional parties plaintiff, was based upon the negligent construction and subsequent maintenance of the embankment and dam in question. By the amendment filed March 24th, 1938, the several claimants altered their position, and by such amendment eliminated their previous charges of negligence in the construction of such dam and embankment.

From the Brief and Argument of counsel for the several claimants, it appears that they now base their right to an award upon some one or more of the following grounds, to wit:

- 1) Negligence of the respondent in the operation of the gates in the dam.

- 2) That the respondent failed to exercise ordinary care in devising the plans for the dam in question, and that by reason thereof the claimants sustained the damage complained of.

- 3) Equity and good conscience.

- 4) The provisions of Section 13 of Article 2 of the Constitution, to the effect that private property shall not be taken or damaged for public use without just compensation.

The above contentions will be considered in the order named.

I.

If there were any liability on the part of the respondent for negligence in the operation of the gates, it would necessarily have to be based upon the doctrine of respondent superior. There can be no question but what the State, in the creation of a fish and game preserve, for the people of the State, is engaged in a governmental function.

It is the well-settled law of this State that in the exercise of its governmental functions, there is no liability on the part of the State for the negligent acts of its servants or agents under the doctrine of respondent superior, in the absence of a statute making it so liable. *Miner vs. State Board of Agriculture*, 259 Ill. 549; *Gebhardt vs. Village of LaGrange Park*, 354 Ill. 234; *City of Chicago vs. Williams*, 182 Ill. 135; *Hollenbeck vs. County of Winnebago*, 95 Ill. 148; *Horney, et al. vs. State*, 9 C. C. R. 354; *Titone vs. State*, 9 C. C. R. 389.

II.

The general rule with reference to liability for defective plans is stated in 43 Corpus Juris, page 952, Section 1730, as follows:

"In the making and adopting of a plan for a public work or improvement a municipal corporation acts in its judicial, discretionary, and legislative capacity, and hence is not liable for injuries which result only from a defect in such plan."

The same rule is set forth in 19 R. C. L., page 1091, Section 376.

The rule as above set forth is with reference to municipal corporations, but applies with even greater force to the State, for the reason that the doctrine of respondent superior applies in many cases to municipal corporations where it would not apply under similar facts to the State.

The rule as above set forth has been recognized in numerous cases in this State, although some of the cases which have stated the rule have failed to apply the same by reason of the facts in the particular case. See *City of Chicago vs. Norton Milling Co.*, 97 Ill. App. 651; *City of Chicago vs. Scher*, 165 Ill. 371; *Hanrahan vs. City of Chicago*, 289 Ill. 400.

III.

The liability of the State in any case, solely on the grounds of equity and good conscience was exhaustively considered by this court in the case of *Crabtree vs. State*, 7 C. C. R. 207, in which case, after reviewing the authorities on the subject, we arrived at the following conclusion, to wit:

"That Section four (4) of paragraph six (6) of the Court of Claims Act, which provides as follows, to-wit: The Court of Claims shall have power to hear and determine all claims and demands, legal and equitable, liquidated

and unliquidated, ex contractu and ex delicto, which the State as a sovereign commonwealth, should, in equity and good conscience, discharge and pay"; merely defines the jurisdiction of the court, and does not create a new liability against the State, nor increase or enlarge any existing liability; that the jurisdiction of this court is limited to claims in respect of which the claimant would be entitled to redress against the State either at law or in equity, if the State were suable; that this court has no authority to allow any claim unless there is a legal or equitable obligation on the part of the State to pay the same, however much the claim might appeal to the sympathies of the court, that unless the claimant can bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure such an award."

The question was again considered by the court in the case of *Titone, et al. vs. State*, 9 C. C. R. 389, in which additional authorities were cited, and the decisions of the courts of other States were reviewed. Upon such review the decision in the Crabtree case was adhered to, and the same has been followed consistently since that time.

IV.

Section 13 of Article II of the Constitution of 1870 provides that private property shall not be taken or damaged for public use without just compensation.

Under the constitutional provision, the right of the claimants in this case to an award is not dependent upon any negligence on the part of the State. If the claimants bring themselves within the constitutional provision, as construed by the courts, they are entitled to an award regardless of whether there is any negligence on the part of the respondent.

The question as to whether private property has been taken or damaged for public use in a given case, within the meaning of the constitutional provision, is not always free from difficulty. Not every person whose property has been damaged is entitled to be compensated therefor. The owner's right to compensation must be determined in accordance with the rules of law and of legal procedure. Cases involving claims for damages for the overflow of lands resulting from the construction of dams, embankments, and other structures, have been before our courts many, many times since the adoption of the Constitution of 1870, and certain principles of law relating thereto were considered well settled by our Supreme Court as far back as 1895.

In the case of *City of Centralia vs. Wright*, 156 Ill. 561 (decided 1895), the plaintiff sought to recover damages to certain lands owned by him, resulting from the construction of a dam across the non-navigable stream known as Crooked Creek, whereby water was set back upon his premises.

On the trial in the Circuit Court it was contended by the defendant that the plaintiff could only recover such damages as had been sustained up to the time the suit was commenced, while on the other hand, plaintiff insisted he was entitled to recover in the one action all damages for the past, present and future.

In considering the question, the court said (page 565) :

"Whether the recovery shall be confined to such damages as had been sustained at the time the action was brought, or would include all past, present and future damages, depends upon another question, and that is, whether the injury is permanent in its nature or merely of a temporary character. If the former, all damages may be recovered; if the latter, only such damages as had accrued up to the time the action was brought."

After reviewing a number of cases, the court said :

"There are many other cases where this same doctrine has been laid down, but the law in this State is so well settled that a reference to other cases is not deemed necessary. * * * It is not necessary to establish the fact that the structure erected by the city shall continue forever in order to determine that the structure is permanent. It is enough that the city had the legal right to erect and maintain the system of waterworks perpetually. * * * We think, therefore, the erection of the dam which caused the damages was a permanent structure, and the Circuit and Appellate Courts properly held that damages past, present and prospective were recoverable."

The law as laid down in the *City of Centralia* case has been approved and followed in numerous cases since decided, and must be considered as the settled law of this State. See *North Shore Street Ry. Co. vs. Payne*, 192 Ill. 239; *Suehr vs. Chicago Sanitary District*, 242 Ill. 496; *Bernhardt vs. B. & O. S. W. R. R. Co.*, 165 Ill. App. 408; *Wheeler vs. Sanitary District*, 270 Ill. 461; *Holm vs. County of Cook*, 283 Ill. App. 190.

From a consideration of the foregoing authorities it appears that in all cases involving claims for damages as the result of the obstruction of water courses, the first question for consideration is whether the obstruction in question is a permanent structure, or whether it is temporary or transient. If it is a substantial structure, constructed pursuant to lawful authority and in an ordinarily careful and prudent manner, it is considered permanent. If it is constructed without lawful authority, or in negligent manner, it is considered

temporary or transient. If the structure is a permanent one, and damages result therefrom, there is but one right of recovery, and such right is in the owner of the premises at the time of the construction of the structure, and does not pass to the grantee of such owner. In such case the measure of damages is the difference between the fair cash market value of the property prior to the making of the improvement, and the fair cash market value thereof after the making of the improvement and as affected by it. If the structure is temporary or transient, successive actions may be maintained by the party injured.

The identical question here involved was considered in the case of *I. C. R. R. Co. vs. Ferrell*, 108 Ill. App. 659. That was a proceeding by Ferrell to recover damage to growing crops, resulting from overflow alleged to have been caused by the Railroad Company in obstructing the natural flow of water through Drury Creek. In that case the court said (page 666):

"Appellant insists that appellee has no right of action to recover damages, although by obstructing Drury Creek, appellant may have caused it to overflow the land described in the declaration; that under the evidence, if appellant is liable at all, it is for permanent injury, and that for such injury there can be but one recovery, and that by the owner of the land.

"This defense is based upon the proposition that the alleged obstructions were lawfully built with reasonable care, and for legitimate railroad use, and are permanent in their character. It is evident from an examination of appellant's charter, as stated before, that the cutting of the channel for Drury Creek on its own right-of-way, the building of a dam across this channel to secure water for its own use, and the bridging of this creek, were within its granted powers, and are, therefore, not unlawful.

"It is not alleged, nor is it proved, that these acts were not done with reasonable care and were not for proper railroad uses.

"The law is well settled in this State, that a railroad company, authorized by its charter, to construct and maintain its road, when it does so skillfully and with reasonable care, and for proper railroad uses, although it may in so doing, injure adjacent property, is not a nuisance that can be abated. It is well settled also, that an injury to property thereby caused, is to be treated as a permanent injury for which but one recovery can be made by the owner of the land, and that the measure of damages is the decreased value of the property, and that a right of action for such damages does not pass to a subsequent grantee of the owner, and that the statute of limitations begins to run from the date of the existence of the causes which produced the injury. * * * These decisions, and others that might be cited, while holding that but one recovery can be maintained by the owner of land injured by lawful and permanent causes, do not hold that a tenant for a term of years whose leasehold estate is lessened in value by reason of such permanent causes, put in operation during his term, may not recover

for damage to such estate. We see no valid reason why he should not recover.

"But applying the principle that the owner can recover in but one action, and that for depreciation in the value of the realty, the tenant could recover in but one action, and that for the damage to his leasehold estate.

"It is also well settled, that a tenant leasing land which is subject to recurring injury from overflows, and damage to crops occasioned by lawful and permanent causes existing when he leased the land, is a volunteer, taking it subject to such damages and with no right of action to recover for the same."

"If a right of action does not pass from the owner to a subsequent purchaser, it follows by analogy, that a right of action in the landlord does not pass to his tenants"

and on page 670:

"The elevation of the dam which appellee testifies caused the overflow having been made in 1893, if appellee remained on the land as tenant from year to year during the years 1896 and 1897, in which years he claims to have been damaged, he was for those years a volunteer holding over, subject to such damages as he might suffer."

In the case of *Horney, et al. vs. State*, 9 C. C. R. 354, the claimant sought to recover damages for loss of crops during the period of five years prior to the filing of the complaint, as the result of water standing or remaining on her land by reason of the construction of a hard-surfaced highway. In that case the claimant acquired title after the completion of the improvement. We found that the improvement in question was a permanent improvement, and that the right of action was in the owner of the property at the time of the making of the improvement; that there could be but one recovery, and that such recovery should include all damages, past, present and future; that a subsequent alienee of the property took the same as it existed at the time of the conveyance, and had no right of action for damages resulting from the improvement and accruing after the conveyance.

The embankment and dam in the case now on trial was constructed by the State pursuant to lawful authority. The complaint as amended does not allege, and the evidence does not disclose, any negligence in the construction of such improvement. It is a substantial structure, and under the authorities above cited, must be considered as a permanent structure. Consequently, there can be but one recovery for damages resulting from the construction of such dam or embankment, and such recovery must be by the owner of the land at the time of the construction of the improvement, and must include all damages, past, present or future, resulting from such construction.

As stated in the case of *I. C. R. R. Co. vs. Ferrell, ante*, if the right of action for damages does not pass from the owner to a subsequent purchaser, a right of action in the landlord does not pass to his tenant.

All of the claimants except T. H. Lipe and R. M. Jeffries being tenants who came into possession of the land after the making of the improvement, took it as it was, and have no claim for damages to their crops.

The claimant, R. M. Jeffries, acquired his property subsequent to the construction of the dam, and consequently has no right of action even for injury to the land.

The claimant, T. H. Lipe, is the owner of the land for which he claims damages, but the measure of his damages is the difference between the fair cash market value of the property prior to the making of the improvement, and the fair cash value thereof subsequent to the making of such improvement, and as affected by it. There is no evidence in the record as to the fair cash market value of his property, either before or after the making of the improvement, and consequently there is no basis for an award to him.

The motion of the Attorney General must therefore be sustained, and the claim of the several claimants herein is dismissed.

(No. 3308—Claimant awarded \$2,470.03.)

THE COUNTY OF WILL, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed April 11, 1939.

JAMES E. BURKE, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

FEEES AND COSTS—*prosecution of convicts for crimes committed within State Penitentiary system—by county where system or part situated and where accused confined—State liable for, under provisions of Illinois Revised Statutes of 1937, Chapter 108, paragraph 118.* Where convict, confined in Illinois State Penitentiary is indicted for crime, alleged to have been committed therein, and county in which said penitentiary is situated prosecutes accused therefor and advances fees and costs in connection therewith, an award for same may be made in accordance with provisions of statute.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

The claimant herein seeks to recover the sum of \$2,548.18, being the amount of money advanced by it for fees and costs in connection with the prosecution of one James Day, an inmate of the Illinois State Penitentiary.

The claim is based upon the provisions of Section 14 of an Act entitled, "An Act in Relation to the Illinois State Penitentiary and to Repeal Certain Parts of Designated Acts;"—*Illinois Revised Statutes of 1937, Chapter 108, Paragraph 118*, which reads as follows:

"When any crime is committed within any division or part of the penitentiary system by any person confined therein, cognizance thereof shall be taken by any court of the county wherein such division or part is situated having jurisdiction over the particular class of offenses to which such crime belongs. Such court shall try and punish the person charged with such crime in the same manner and subject to the same rules and limitations as are now established by law in relation to other persons charged with crime in such county. * * * and provided, further, that all fees and costs arising from the prosecution of convicts for crimes committed within the penitentiary system, which would otherwise be paid by the county, shall be paid by the State."

It appears that one James Day, an inmate of the Illinois State Penitentiary located at Stateville, Joliet, Will County, Illinois, was indicted for the murder of one Richard Loeb, another inmate of said penitentiary; that said Day was tried for said crime in the Circuit Court of Will County, and that the trial occupied the time from May 25th, 1936 to June 4th, 1936.

The Attorney General filed an Answer on behalf of the respondent, in which he admits that there is due and owing to the claimant the sum of \$2,470.03 for fees and costs as above set forth.

Thereupon the claimant filed a waiver of the amount claimed in excess of \$2,470.03, and asked for an award in the last mentioned amount.

Under the aforementioned statute and the pleadings in this case, it appears that the claimant is entitled to the sum of \$2,470.03 and an award is therefore entered in favor of the claimant for such amount.

(No. 3179—Claimants awarded \$1,500.00.)

NANCY TRANCHITA, AMELIA PARIS AND TONY TRANCHITA (AGED 10 YEARS), ANGELINA TRANCHITA (AGED 9 YEARS), AND JACK TRANCHITA (AGED 6 YEARS), MINORS, BY NANCY TRANCHITA, THEIR NEXT FRIEND, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 1, 1939.

Rehearing denied April 12, 1939.

MICHAEL R. DURSO and SIMON T. SUTTON, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—death resulting therefrom—when award for compensation may be made.* An award may be made to dependents of member of Illinois National Guard, who sustained personal injuries, resulting in his death, while in the performance of his duties, and acting in obedience to the orders of his military superiors, under authority of the Military and Naval Code.

SAME—*same—same—same—how amount may be determined—may be computed under provisions of Workmen's Compensation Act.* Where an award is justified under the evidence and provisions of Military and Naval Code, to dependents of member of Illinois National Guard, who sustained personal injuries resulting in his death, the amount thereof may be determined by the court on any proper basis justified under the evidence, and it may resort to the provisions of the Workmen's Compensation Act as being the proper basis for such determination, but is not limited to same.

MR JUSTICE YANTIS delivered the opinion of the court:

Claimant Nancy Tranchita is the mother of Frank Paris, Deceased; Amelia Paris is the latter's sister, and Tony Tranchita, Jack Tranchita and Angelina Tranchita are half-brothers and half-sister respectively of said Frank Paris.

The latter was a member of Company A, 132nd Infantry of the Illinois National Guard, and on August 12, 1937 was engaged in field maneuvers with his regiment near Rockford, Illinois. He was riding on a convoy truck with eight or nine other men. At a sharp curve and descent in the roadway and because of the condition of the brakes on the truck, the incline and the sharp turn, the driver of the truck lost control, causing the truck to side-swipe the supports of a bridge over which they were then passing. Private Paris was seated facing the rear of the truck, with his left foot on the seat and the right foot on the floor. The impact of the truck striking the bridge caused him to lose his balance and his left leg ex-

tended outside of the truck and was crushed between the right side of same and the bridge supports. Immediate first aid was applied by the medical officer of the 129th Infantry and he was taken by ambulance to St. Anthony's Hospital in Rockford where, according to the Adjutant General's report, everything possible was done for him, but he died within a few hours as a result of such injury. The Medical Board's report shows that the accident occurred in the line of duty and was not due to any misconduct on the soldier's part. The Coroner's verdict in the case contains the following:

"We, the jury, find that the driver of the truck was not competent, not familiar with the vehicle and recommend that in the future all trucks used in Army War Game Maneuvers have drivers familiar with their duties and that the equipment be kept in first class condition."

It is apparent from the record that a claim under the provisions of the Military and Naval Code (Ch. 129, Sec. 143, Smith-Hurd Ill. Rev. Stat., 1935) is proper. Such section reads as follows:

"In every case where an officer or enlisted man of the National Guard or Naval Reserve shall be injured, wounded or killed while performing his duty as an officer or enlisted man in pursuance of orders from the Commander-in-Chief, said officer or enlisted man, or his heirs or dependents, shall have a claim against the state for financial help or assistance, and the State Court of Claims shall act on and adjust the same as the merits of each case may demand."

Amelia Paris, the adult sister of Frank Paris, and Nancy Franchita individually as his mother, and also as next friend for the three minor children, seek an award of Four Hundred Forty (\$440.00) Dollars for burial expenses incurred for the deceased, and a further award of Ten Thousand (\$10,000.00) Dollars as compensation for the loss to their means of support and further education. Two months prior to the time of his death Frank Paris became employed in the Presbyterian Hospital at Chicago, Illinois, at the rate of Sixty (\$60.00) Dollars per month, and was so employed at the time of his death. All of the claimants, the deceased, Frank Paris, and his stepfather lived together in Chicago. Frank Paris was born July 21, 1918 and was never married. His father is dead. His stepfather, Andrew Franchita, the daughter, Amelia Paris, and the deceased, Frank Paris, were all employed at the Presbyterian Hospital in Chicago. The stepfather earned approximately One Hundred (\$100.00) Dollars per month and the sister approximately Fifty (\$50.00) Dol-

ars per month. They and the brother gave their money to the mother and she used it to pay the rent, light and gas bills, food, clothing, medicine and other family expenses. Mrs. Franchita testified that sometimes she gave her son and daughter back Five (\$5.00) Dollars that they could use for themselves to buy such clothes as they might desire.

In order that the son, Frank Paris, might help contribute to the family earnings, he was taken out of High School six months before time for him to graduate, and the earnings which he and his sister and stepfather contributed to the family, in the total sum of Two Hundred Ten (\$210.00) Dollars per month, was expended for the general maintenance of the family of seven. Presuming that he received his one-seventh share of the benefits thereof, his surplus contribution to the other members of the family would be Thirty (\$30.00) Dollars per month. Whatever right to an award exists in favor of claimants is by virtue of the aforesaid provisions of the Military and Naval Code of Illinois. No hard and fast rule exists for determining what amount should be allowed. In certain of these cases the court has seen fit to take as a guide, but not as a fixed rule, the provisions of the Illinois Workmen's Compensation Act, in determining what payment would be reasonable and customary for the loss sustained. *Section 7 (c)* of that Act provides:

"Where the deceased leaves no widow or children whom he was under legal obligation to support, but leaves a parent, child or children who at the time of the injury were partially dependent upon his earnings, then the amount of compensation to be paid for an injury to such person resulting in the latter's death, shall be such proportion of a sum equal to four times the average annual earnings of the employee as such dependency bears to total dependency, but not less in any event that \$1,000.00 and not more in any event than \$3,750.00. Any compensation payments other than necessary medical, surgical or hospital fees shall be deducted in ascertaining the amount payable on death."

If the deceased had been an employee of the State, and had suffered the injuries complained of while so employed, no award in excess of the minimum sum of One Thousand Four Hundred Forty (\$1,440.00) Dollars would have been allowable.

Considering what would be a proper award in this case had the deceased been an employee of the State, and from a consideration of all the facts appearing in the record, the court finds that no award in excess of One Thousand Five

Hundred (\$1,500.00) Dollars would be justified herein, as the proportionate part of the earnings received by the claimants from the wages of the deceased were considerably less than the amount required for such an award. An award is hereby made in favor of claimants in the total sum of One Thousand Five Hundred (\$1,500.00) Dollars, for loss of services due to the death of said Frank Paris. Again guided by the rule in compensation cases, no additional allowance is made for the funeral expenses incurred by his family for deceased. As the record shows that Amelia Paris was not receiving any support from deceased, but was, like her stepfather and the deceased, paying her own share of such household expense, and contributed to the care and support of the other members of the household, the award herein is made payable to Nancy Tranchita individually and as next friend for Tony Tranchita, Angelina Tranchita and Jack Tranchita, minor complainants.

(No. 2155—Claim denied.)

HENKEL CONSTRUCTION COMPANY, Claimant, vs. STATE OF ILLINOIS
Respondent.

Opinion filed April 12, 1939.

WILLIAM M. SCANLAN, for claimant, OSCAR E. CARLSTROM,
of counsel.

JOHN E. CASSIDY, Attorney General; MURRAY F. MUEHL,
Assistant Attorney General, for respondent.

CONTRACTS—claim for damages caused by delay of State in securing right-of-way—provision in contract precluding—when award denied. Where specifications forming part of contract for construction of highway improvement contain provision that acceptance of last payment for work done thereunder, shall operate as and be a release to the State from all claims or liabilities under contract, for anything done or relating to work under same, or for any act or neglect of the State relating to or connected with contract, such provision is binding, and if said last payment is made and accepted, an award for damages claimed to have been sustained by reason of delay of State in securing right-of-way, must be denied.

MR. JUSTICE YANTIS delivered the opinion of the court:

Henkel Construction Company, claimant herein, is a co-partnership, engaged in the business of building and constructing highway improvements in Illinois and other states. It submitted a bid to the State of Illinois, Department of Public Works and Buildings, Division of Highways, at a let-

ting held on August 4, 1926, and thereafter claimant was awarded a contract for the building and construction of Sections 19 and 20 of S. B. I. Route No. 18. On August 18, 1926 the following letter was mailed to claimant by Frank T. Sheets, Chief Highway Engineer:

Gentlemen:

"On August 7, you were awarded the contracts for the above mentioned sections subject to the following special provision in each of these contracts:

"Right of Way. The right of way for the road to be built under the terms of this contract has not as yet been secured, but will be secured on behalf of the Department of Public Works and Buildings. No work shall be done on this section until formal written notice to proceed has been given by the Department to the contractor, but the work shall be completed within six months after said formal notification has been given. No extra compensation nor claim for damages will be allowed the contractor on account of delay in securing the right-of-way and starting work."

"The right of way for the following portions of these sections has now been secured:

"Section 19 from Station 109/00 to Station 213/00.

"Section 20 from Station 14/36 to Station 276/00.

"Work may, therefore, be started immediately on the portions for which the right of way has been secured. No work should be undertaken on the remainder of the sections until you have been further advised by this Department."

Separate contracts for the construction of the several sections were entered into, and one section known as 20-X provided for under Contract No. 2793, was carried on to completion, and was not involved in any delay in connection with the construction of Sections 19 and 20.

Claimant was authorized by letter, dated August 18, 1926, signed by C. M. Hathaway, Engineer of Construction, to place orders for cement for use in building Sections 19 and 20. Claimant also received a letter, dated August 19, 1926, signed by M. J. Fleming, District Engineer, urging claimant to commence work on Sections 19 and 20 as soon as possible, such letter stating,

"five miles of right of way had been cleared up on Section 20 extending from Mendota to Meriden and two miles had been cleared up on Section 19 extending through Earlville and to the west.

"* * * will be glad to receive your letter as soon as possible, advising when the culvert and grading outfits can start."

C. M. Hathaway, Engineer of Construction, also wrote claimant on August 24, 1926 stating to claimant that construction of these sections (19 and 20) this season is extremely important and every effort should be made on your part

to start work immediately. Claimant notified Hathaway by telegram and letter that they expected to start work the next Friday or Saturday, i. e. September 3rd or 4th, 1926. In that letter claimant stated, "our plans are to move our outfit on the job this fall and winter and be all set for an early start on the paving next spring." During September, 1926 claimant started work building culverts, excavating and grading and continued until stopped by bad weather. This work was resumed in the spring of 1927, and on May 27th C. M. Hathaway authorized claimant to place further orders for cement. In the early part of June, 1927 claimant moved in its paving outfit to the location near Meriden and commenced laying cement on the sections of S. B. L. No. 18 covered by its contracts. It continued its work until June 25, 1927 when a telegram was received by Carl Henkel as follows:

"Supreme Court of Illinois in *Hill, et al. vs. County of LaSalle, et al.* holds that bill for injunction in reference to location of Route Eighteen, Section Nineteen and that portion of Section Twenty from Meridian east should be heard on its merits. Therefore we direct you to stop work today until location has been approved by the courts."

This injunction suit was predicated on averments that the right of way indicated by the Division of Highways for a distance of approximately eighteen miles between the Villages of Somonauk and Meriden, was through territory over which no highway had ever been previously established and did not conform to the route set forth in the bond issue statute under which the road was being constructed.

Upon receipt of this telegram claimant discontinued its work on Section 19 and that part of Section 20 east of Meriden which were involved in and affected by the above decision of the Supreme Court, but proceeded to carry on the construction of pavement on that part of Section 20 lying west of Meriden.

The paragraph concerning right of way, contained in the letter from Mr. Sheets to claimant under date of August 18, 1926, was also included as a special provision in each of the contracts which claimant signed.

After claimant completed its work west of Meriden and having been notified not to proceed further with work lying east of Meriden pending the determination of the controversy under the Hill case, claimant early in the year 1928 abandoned its camp and moved its supplies to another section of the State where it had other work.

As a result of the above suit and the adjustment made thereunder, the route of S. B. I. No. 18 was relocated, so as to be entirely clear of Section 19 and a part of Section 20. These portions of Sections 19 and 20 as specified in the contract were abandoned and such portions of Sections 19 and 20 as relocated were thereafter constructed under the provisions of Supplementary Agreement, signed by claimant on October 24, 1928. These Supplemental Agreements contained recitals referring to the prior execution of the original contracts on August 7, 1926; that a decision of the Supreme Court had been entered on June 23, 1928, making it necessary to modify the location of certain portions of Route No. 18, and that,

"For and in consideration of the payments and agreements herein contained, party of the second part (claimant herein) agrees with said party of the first part at his own proper cost and expense to perform all the work, furnish all the materials and all labor necessary for the construction of a Portland cement concrete pavement on a location which will be a modification of the location as described in the above mentioned contract for said Section 19 * * *, as provided in the revised plans for Section 19, approved by said party of the first part, August 11, 1928, and which are made a part hereof. The following work shall be performed in accordance with said plans prepared by the Department of Public Works and Buildings, Division of Highways, and said work shall be considered a full performance of the original contract instead of the completion of the unfinished work contemplated in the original contract, and will be paid for at the following unit prices, as provided in the original contract * * *. It is further agreed that all conditions, terms and other provisions of the original contract shall govern, except as specified herein."

Claimant constructed the paving on Sections 19 and 20 as relocated, and completed its work during the last week of July, 1929. The damages which it seeks are the result of a change in proposed right of way and delay incident to acquiring parts of such right of way, and the relocation of the sections of roadway in question, which prevented claimant proceeding normally with its work. Said changes necessitated its moving and rehandling its machinery and supplies with additional expense for Superintendent, Time-keepers and Foremen, all in an amount of Twelve Thousand Four Hundred Thirty-one and 10/100 (\$12,431.10) Dollars, for which it filed its claim in the Court of Claims on April 19, 1933.

A number of conferences were held between Carl Henkel, officials of the Highway Department, and of the Attorney General's Office, as a result of which a revised statement of

claim in the sum of Nine Thousand Five Hundred Fifty one and 16/100 (\$9,551.16) Dollars was filed, and no contention exists as to the computation of damages.

The only question to be determined is the liability on the part of the State of Illinois to pay claimant the said sum of Nine Thousand Five Hundred Fifty-one and 16/100 (\$9,551.16) Dollars.

The Attorney General contends that the claim is barred by the special provision contained in both the original and supplemental contracts, absolving respondent from damages on account of delay in securing the right of way or in starting work. Also, that the claim is barred by the statute of limitations as not having been filed within five years after claimant's right of action accrued. Further, that the claims are also barred by the language of Section 41, General Specifications, which were made a part of the contracts in question, said clause being,

"The acceptance by the contractor of the last payment as aforesaid shall operate as and shall be a release to the department from all claims or liability under this contract for anything done or furnished, or relating to the work under this contract, or for any act or neglect of said department relating to or connected with this contract,"

it appearing from the record that the Engineers' final payment estimates for said Sections 19 and 20 were scheduled for payment on December 20, 1929, and that State warrants No. 203020 and No. 203021 were sent to claimant on December 31, 1929 and were returned to the auditor January 7, 1930 after having been cashed by claimant.

Counsel for Claimant contends that the right of way clause, "No extra compensation nor claims for damages will be allowed the contractor on account of delay in securing the right of way and starting work," should not bar this claim, because, as he claims, the delay which arose here was not in securing the right of way but was due to the court order in the case of *Hill vs. LaSalle Co.*, 326 Ill. 508, and the subsequent action of the Highway Department in changing or re-locating a section of the proposed road; further, that such delay was not in "starting work," but was the result of discontinuance of work after having been started, such discontinuance being due to the instructions of respondent.

The court is mindful of the apparent earnest effort that has been made by claimant in conference and otherwise, to

reduce its claim to an amount which respondent's agents agreed it was in fact damaged. If the contract under which it performed the work in question would, by its terms, permit a recovery, we would without hesitation grant an award for the amount of additional expense to which claimant is shown by the record to have been put because of the delayed construction. We have endeavored to adhere to the rule that in recognizing the demands of equity and good conscience, awards must be restricted to those claims wherein the State would be liable if suable in a court at law. While claimant did in fact discontinue its construction work on June 25, 1927, in response to the telegram of that date from the Director of the Highway Department, such stopping of work and the telegram and decision of court which prompted the sending of the message, were all delays resulting from the failure to secure the right of way for the proposed S. B. I. Route No. 18.

Claimant cites the case of *Carson-Payson Co. vs. State*, 8 C. C. R. 581 and *Willadsen vs. State*, 8 C. C. R. 604, in support of its contention that "Where claimant sustains a loss under his contract with the State through no fault of his own but occasioned solely by the State, through a change of plans, an award will be made." The distinction between the cases cited and the case at bar is that the defenses herein urged do not appear in either of said cases, and so far as the record discloses, the contracts in neither of those cases contained any provision similar to the non-payment clause in the right of way specification contained in the present contract.

Claimant was aware of the possibilities of delay on this job, because the clause for non-payment of any claims for damages due to delay in securing the right of way that was contained in the original specifications, was quoted in the departmental letter to claimant of August 18, 1926, wherein claimant was told of having been awarded the contracts in question, and was referred to in claimant's letter of September 1, 1926 to C. M. Hathaway. In this letter claimant stated, "On the day we signed the contracts we informed Mr. Sheets that we were unwilling to start any work until all right of way was cleared," etc. Such comment or statements could not change the effect of the contract itself. Such proviso is incorporated in the supplementary agreements of October 24, 1928 by virtue of the clause therein which reads, "It is further agreed that all the conditions, terms and other provisions

of the original contract shall govern except as specified herein." We are unable to reach any other conclusion than that the entire difficulty in the construction of the highway in question arose out of obtaining the proposed right of way. The injunction suit was the result thereof, and the instructions of the Highway Department to discontinue the work followed the latter. Observance of the contract undoubtedly works a hardship upon claimant, but the latter made its contract and knowingly accepted its terms. What is true in regard to the provision just discussed is also true with regard to the further provision contained in Section 41 of the Standard Specifications for road and bridge construction, which formed a part of claimant's contract, as hereinabove quoted. In view of the foregoing views, we will not extend the record by discussing the question when the claimant's right of action might have accrued. With due reluctance an award is denied and the claim dismissed.

(No. 3139—Claimants awarded \$1,925.00.)

ROBERT H. STREEPER AND I. H. STREEPER III, A Co-PARTNERSHIP,
DOING BUSINESS UNDER THE NAME OF C. N. STREEPER SONS,
Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 9, 1939.

I. H. STREEPER, III, for claimants.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR,
Assistant Attorney General, for respondent.

STATE HOSPITALS FOR INSANE—*inmates of—support of, obligation of State.* Since the adoption of the Charities Act of 1912, there is no liability on the part of the county, township or other municipal corporation, for the support of patients at any State hospital for the insane, same being an obligation of the State, even though the cost thereof may be recovered from any estate of any such patient, or from relatives legally liable for their support, who have sufficient ability to pay therefor.

SAME—*same—same—includes obligation to bury body of deceased, when not claimed by relatives.* Where the State, is under the law obligated to support patients of State Hospitals for the Insane, support includes burial, and when a patient of such hospital dies and no relatives claim the body, the State is obligated to provide burial therefor and is liable for the reasonable expenses thereof.

SAME—*burial of bodies of deceased inmates of—when not claimed by relatives—State obligated to provide under common law and irrespective of*

NOTE. Even though there may be no statute, obligating State to provide burial for deceased patient of State Hospital for Insane, when no relative claims body of such decedent, there is a common law obligation on the part of the State to provide such burial and pay the reasonable cost thereof.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimants are engaged in the undertaking business at Alton, Illinois, and on November 5th, 1937, filed their claim herein for \$1,925.00, for services in connection with the burial of fifty inmates of the Alton State Hospital;—such services having been rendered at various times during the period from February 8th, 1933 to June 2d, 1937, inclusive.

It appears from the record that each and every burial was ordered by the Superintendent of the institution, in accordance with a custom which is as old as the institution itself; that so far as can be ascertained, none of the persons buried left any estate; that none of the relatives of any of such deceased persons claimed the body; that all of the bodies were buried in the institution cemetery; and that the charge made for each burial, to wit, \$38.50, is the charge fixed by the Department of Public Welfare therefor.

Claimants presented their claim to the Managing Officer of the Alton State Hospital on or about September 11th, 1937, but payment thereof was not made on account of the fact that the respective appropriations from which the several items were properly payable, had lapsed prior to the time any action could be taken on the claim.

The Attorney General has entered a motion to dismiss the case, and contends that there is no constitutional or statutory provision making the State liable for the burial expenses of inmates of a State hospital; and that under the provisions of the "Pauper Act" of this State (Ill. Rev. Stat. 1937, Chap. 107) and the decision of the Supreme Court in the case of *Town of Kankakee vs. McGrew*, 178 Ill. 74, construing certain provisions of such Act, the liability for such burial expenses is upon the relatives of the deceased inmate, if they are of sufficient ability, and if not, then the liability is upon the municipality charged by the provisions of the "Pauper Act" with the support of such persons.

The pertinent sections of such "Pauper Act" are as follows:

Section 1—"That every poor person who shall be unable to earn a livelihood in consequence of any bodily infirmity, idiocy, lunacy, or other unavoidable cause, shall be supported by the father, grandfather, mother, grandmother, children, grandchildren, brothers or sisters of such poor person, if they, or either of them, be of sufficient ability."

Section 14—"Counties not under township organization shall relieve and support all poor and indigent persons lawfully resident therein," etc.

Section 14(a)—"Cities, villages and incorporated towns having a population of more than 500,000 inhabitants and all incorporated towns which have superseded civil townships, shall relieve and support all poor and indigent persons lawfully resident therein," etc.

Section 15—"In counties under township organization * * * the various towns * * * shall relieve and support all poor and indigent persons lawfully resident within their respective territories," etc.

It will be noted that each and all of the aforementioned sections provide only for the "support" of the unfortunate persons therein named, and that no reference whatsoever is made to the burial expenses of such persons.

In the case of *Town of Kankakee vs. McGrew, ante*, relied upon by the Attorney General, the court, in considering the several sections of the "Pauper Act," said, page 84:

"The necessities of the unfortunate class designed to be relieved by the law do not, however, admit of delay. Pain and suffering must be relieved, food, fuel, clothing and shelter must be furnished to those in need. *They must be buried.*"

The important part of the above quotation is the recognition by the Supreme Court of the fact that the burial is a part of the support which must be furnished.

The aforementioned "Pauper Act" was adopted in 1874 and so far as the question here involved is concerned, the sections quoted are substantially the same now as they were when first enacted.

In considering the question here involved, it will also be necessary to consider some of the provisions of the "Charities Act" of this State (Ill. Rev. Stat. 1937, Chap. 23, approved June 11, 1912).

Section 20 of such Act provides as follows:

"The Board of Administration is hereby required and empowered to cause the removal of insane persons from county almshouses to State hospitals for the insane," etc. * * * "After sufficient accommodations shall have been provided in State institutions for all the pauper and indigent insane of all the counties of the State, the cost of clothing and other incidental expenses of county insane patients in State hospitals shall not be a charge upon any county after the first of January next ensuing, but the cost of the same shall be paid out of funds provided by the State for the support of the insane."

Section 21 of such Act provides as follows:

No insane person now, or hereafter, under the care of any State hospital in this State, shall be returned or committed to the care of any county insane asylum or almshouse, or to any county, town or city authorities; and the said county, town or city authorities are hereby forbidden to receive any such patient who may be returned or committed to them in violation of this section. After the State has assumed complete care of the public insane, no insane person shall be permitted to remain under county care, but all public insane shall be committed to the State hospital for the insane, or to private hospitals for the insane, as provided herein."

Section 23 of such Act provides as follows:

The total cost of the support of inmates of State hospitals for the insane shall be a charge against the estates of patients or their conservators, or against the relatives of such patients who would be liable for the support of the persons of such inmates under an Act entitled 'An Act to Revise the Law in Relation to Paupers,' approved March 23, 1874, if they were not inmates of such hospitals," etc. * * * "and upon the death of any such patient while an inmate of a State hospital for the insane, it shall be the duty of said board to file a claim against the estate of said deceased patient for all the balance of the unpaid support given for the entire term such deceased person was an inmate of any State hospital for the insane, and it shall be the duty of the court in which such claim is filed to allow the same and direct its payment in due course of administration."

From a reading of said Sections 20, 21 and 23, it seems clear that it is the policy of this State since the adoption of the "Charities Act" of 1912, that all of the insane patients of the several counties of the State shall be cared for and supported by the State, at State institutions such as the Alton State Hospital. If the "support" of such persons includes burial expenses, as indicated by the Supreme Court in the McGrew case, then such burial expenses must be furnished by the State.

It also seems clear that since the adoption of the "Charities Act" of 1912, there is no liability on the part of the county, township, or other municipal corporation for the support of the patients at any State hospital for the insane. The fact that Section 23 provides that the total cost of the support shall be a charge against the estates of patients, or against the relatives who would be liable for their support under the "Pauper Act," indicates that the support is to be furnished by the State, and that the cost thereof is to be recovered, if possible, from the estate of a patient, or from his relatives if they are of sufficient ability to pay for the same.

All of which leads to the conclusion that the "support," including burial expenses of deceased patients whose bodies are not claimed by their relatives, is to be furnished by the State, and that the State is liable therefor in the first instance.

The fact that the State has established a cemetery at such institution would seem to indicate that this is the construction which has been placed upon the Act by the State itself.

In this connection it might be well also to consider briefly the liability of the State, under the facts here involved, in the absence of any statutory provisions relative thereto.

In an annotation on "The Duty and Liability of Strangers in Respect to Corpse," L. R. A. 1918D, the following annotation appears on page 281:

"There is little of actual decision upon the duty and liability of strangers in respect to a corpse. The leading authority is the opinion of Lord Denman in *Reg. vs. Stewart* (1840) 12 Ad. & Ed. 773, 113 Eng. Reprint, 1007, 8 Eng. Rul. Cas. 462, where he said: 'It should seem that the individual under whose roof a poor person dies is bound to carry the body decently covered to the place of burial; he cannot keep him unburied, nor do anything which prevents Christian burial: he cannot therefore cast him out, so as to expose the body to violation, or to offend the feelings or endanger the health of the living and for the same reason he cannot carry him uncovered to the grave.' It will probably be found, therefore, that, *where a pauper dies in a parish house, poor house, or union house, that circumstance casts on the parish or union, as the case may be, to bury the body; not by virtue of the Statute of Elizabeth, but on the principles of the common law.* * * * The modern view of the law is based generally upon the foregoing observations of Lord Denman.

"Thus, the first part of the statement heretofore quoted from *Reg. vs. Stewart* was referred to, for example, in *Wynkoop vs. Wynkoop* (1863) 42 Pa. 293, 82 Am. Dec. 506, and was quoted in *Pierce vs. Swan Point Cemetery* (1832) 10 R. I. 227, 14 Am. Rep. 667, and in *Rappelyea vs. Russell* (1862) 1 Daly (N. Y.) 214.

"So, in *Patterson vs. Patterson* (1875) 59 N. Y. 574, 17 Am. Rep. 384, the court said: 'It would seem, at common law, that if a poor person of no estate dies, it is the duty of him under whose roof his body lies to carry it, decently covered, to the place of burial'; and in *Scott vs. Riley* (1883) 16 Phila. (Pa.) 106, it was said that the common law casts the duty of burying the dead in the proper manner and place upon the person under whose roof the death occurs. * * *

"In *Finley vs. Atlantic Transp. Co.* * * * 220 N. Y. 249, L. R. A. 1917E, 852, 115 N. E. 715, the court said: 'At common law it is the duty of an individual under whose roof a poor person dies to carry the body, decently covered, to the place of burial, and to refrain from doing anything which prevents in any wise a suitable burial. The body cannot be cast out so as to expose the same to violation or to offend the feelings or injure the health of the living.'"

The record in this case shows that the relatives of none of these deceased patients claimed the body.

The court is of the opinion that under such circumstances, the State, having a proper regard for the sensibilities of the public, for the protection of those rights which are held sacred by all Christian people, and due consideration for the health of the people, cannot evade a duty which by the common law is imposed upon all citizens.

From the foregoing we conclude that under existing statutes, the obligation to support the inmates of the Alton State Hospital rests in the first instance upon the State; that under the decision of the *Town of Kankakee vs. McGrew*, the obligation to support includes the obligation to bury deceased patients whose relatives do not claim the body; that even if there were no statutory provisions relative thereto, there is a common law obligation on the part of the State to provide a burial for patients dying at a State hospital for the insane, where no relatives claim the body.

Therefore, we are of the opinion that the claimants would be entitled to recover from the State in a suit at law, if the State were suable, and consequently they are entitled to an award in this proceeding.

Award is therefore entered in favor of the claimants for the sum of Nineteen Hundred Twenty-five Dollars (\$1,925.00).

(No. 3089—Claim denied.)

PATRICK H. DIGNAN, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 9, 1939.

N. TERRY and HOVEY & ELY, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

DEDICATION OF PROPERTY FOR PUBLIC USE—effect of deed of. Where property for public use is acquired by deed of dedication, instead of by condemnation, such deed containing a release of any and all claims for damages sustained by reason of the construction of a permanent improvement for which obtained, the payment of the consideration agreed upon, has the same effect as the assessment of damages in condemnation proceedings, and includes damages to property not conveyed, the same as in condemnation proceedings.

SAME—testimony of grantor alone insufficient to impeach deed of. Where a deed has been acknowledged and contains the certificate of an officer

authorized by law to take acknowledgments, the certificate of the officer, showing that the deed was executed and acknowledged by the grantor, cannot be overcome or impeached by the testimony of grantor alone.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant filed his complaint herein on April 2, 1937, and alleges therein in substance that he is the owner in fee of a tract of vacant and unimproved land containing 44.5 acres located in Section 7, Township 37, North Range 13 East of the Third Principal Meridian, in the Town of Worth, in the County of Cook and State of Illinois; that said tract is bounded on the north by 99th Street, on the east by Ridgeland Avenue, and abuts the right-of-way of the Chicago Terminal Railway Co. on the southwest, and is traversed by a public highway known as the Southwest Highway, which is 100 feet in width and traverses the southeast portion of said property for a distance of approximately 825 feet; that on or about August 18th, 1930 the County of Cook entered into a contract with one James P. O'Keefe, whereby said Southwest Highway was to be extended to traverse the land of the claimant at grade level; that on November 23d, 1931, said County of Cook filed a condemnation proceeding in the Superior Court of Cook County to condemn a right-of-way for a public highway (said Southwest Highway) through claimant's land; that thereafter, to wit, on October 15th, 1932, claimant accepted the sum of \$6,791.10 "in full payment from the County of Cook for any compensation or award due to him under the aforesaid condemnation suit;" that said sum was accepted by claimant, "based on the plans, surveys and proposals of the County of Cook and its existing contract with James P. O'Keefe as aforesaid that the said highway would cross and traverse the land of the plaintiff at grade level;" that thereby the County of Cook acquired the right-of-way across the land of the claimant to construct a grade level highway; that said suit was dismissed on January 16th, 1933; that on March 1st, 1934 the Illinois Commerce Commission entered an order allowing the County of Cook to construct an over-crossing for the Southwest Highway, said over-crossing to be a 27-span structure having a roadway width of 44 feet, with a sidewalk width of five feet on the easterly side thereof, said over-crossing to traverse the property of the claimant

for a length of 825 feet, more or less; that on or about March 1st, 1934 the respondent started the construction of the over-crossing and highway across the land of the claimant and completed same in October, 1934; that by reason of the construction of such over-crossing over the land of the claimant, his land has been divided, and direct access to said land from the Southwest Highway has been cut off, and his property has been damaged to the extent of \$100,000.00, in violation of his constitutional rights.

Testimony was taken on behalf of the claimant. The claimant and one Harry L. Emerson were permitted to testify as to their respective understanding of certain court proceedings, contracts, etc., pursuant to a stipulation that claimant would thereafter produce certified photostatic copies of such documents.

Claimant having failed to produce the same in accordance with the stipulation, a rule was entered herein on the 14th day of February, A. D. 1939, requiring him to produce the same within twenty days thereafter. Upon his failure to comply with the rule, all testimony of the claimant and of Harry L. Emerson relative to the contents of the documents embraced in the aforementioned stipulation, was stricken from the record.

Upon the close of claimant's case, the Attorney General moved to dismiss the case upon the following grounds:

1. The acceptance by claimant of the sum of \$6,791.10 under the facts in the record constituted a release of any and all claims for compensation for land taken, as well as for land damaged but not taken.

2. Even if claimant were entitled to damages, there is no competent evidence in the record to establish the same.

The case now comes before the court for consideration upon that part of the testimony offered on the part of the claimant which remains in the record, the report of the Division of Highways, copy of which was forwarded by respondent to claimant pursuant to the rules of this court; and the motion of the respondent to dismiss the case.

Claimant takes the position that the sum of \$6,791.10 so paid to him by the County of Cook as aforesaid, was accepted by him with the understanding that the highway in question would cross his land at grade level and not by way of an over-

crossing; and that the plans for the construction of the improvement pursuant to which he was paid the sum of \$6,791.10 provided for a grade crossing.

The law applicable to cases of this kind is set forth in the case of *Otis Elevator Co. vs. City of Chicago*, 263 Ill. 419, as follows:

"In a condemnation proceeding the law permits the petitioner to exhibit its plans for the construction of the improvement, and the damages are assessed on the basis that the plans will be carried out, and only such damage will accrue to adjoining lands as will result from the construction of the improvement according to the plans. If, after such an assessment, there is a change affecting the adjoining lands more unfavorably and depreciating their market value, there is a right of action for the increased damage and the measure is the additional injury caused by the alteration."

It is admitted that the highway was actually constructed as an over-crossing, consequently it devolved upon claimant to show that the plans for the improvement in accordance with which he was compensated, provided for a grade level highway. The best evidence of such facts was the original plans. If such plans, or properly authenticated copies thereof, could not be obtained, secondary evidence of the contents thereof should have been offered. However, claimant not only failed to produce the original plans or properly authenticated copies thereof, but also failed to produce any competent secondary evidence of the contents of the same. He testified personally as to such plans, and produced the testimony of another witness with reference thereto, upon an agreement with opposing counsel to produce the original documents later. The original documents, however, were not produced, and the verbal testimony relative thereto was stricken from the record.

The report of the Division of Highways, copy of which was forwarded to claimant, and which under Rule 21 of this court is prima facie evidence of the facts set forth therein, contains, among other things, the following:

"The settlement Mr. Dignan made with the county mentioned in paragraph 7 was a settlement for land taken and release of damage to land not taken to build the Southwest Highway over the Belt Railroad on the southeasterly line of the Dignan property."

There was included in such report of the Division of Highways as a part thereof, a portion of an appraisal of claimant's property prepared by Barrett Bros. showing, among other things, the following items:

VALUATION

| | |
|---|------------|
| Land (exclusive of improvements) 1.676 acres @ \$1,200.00 | |
| per acre | \$2,011.20 |
| Improvements | None |
| Consequential Damages | None |
| Damages to remainder (see remarks) | 4,785.90 |
| Total | \$6,797.10 |

In our opinion the highest and best use of the unit of land containing 44.54 acres, of which the tract to be acquired for highway is now a part, is for utilization for industrial purposes. The proposed highway which will intersect this unit of 44.54 acres of land will leave approximately 9.946 acres lying on the southeasterly side of the new highway. The construction of a bridge over this portion of the area to be acquired for highway will, in our opinion, interfere with the light and air of any industrial building to be constructed within the area of 50 feet on either side of the proposed highway. The amount which we have allowed in this appraisal as damages to the remainder in the sum of \$4,785.90, due to the taking of the above tract for highway purposes and the construction of a bridge on this area to be acquired, was derived as follows:

- (1) Valuation of a 50 ft. strip of land on each side of the Proposed Highway extending from Ridgeland Avenue to the railroad right of way, a total of 1.690 acres @ \$1,200.00 per acre. \$2,028.00
- (2) The proposed highway will isolate approximately 9.946 acres lying southeasterly of the new highway. Of this 9.946 acres, we have allowed 100% damage to the first 50 ft. abutting on the new highway on the southeast, which is equivalent to 0.753 acres. Deducting 0.753 acres from 9.946 acres leaves an area remaining of 9.193 acres. In our opinion this remaining area of 9.193 acres will be damaged to the extent of 25% of its valuation. The total valuation of this area of 9.193 acres at \$1,200.00 per acre makes a total sum of \$11,031.60—25% of this amount equals \$2,757.90. \$2,757.90

Total Damage \$4,785.90

The aforementioned report of the Division of Highways contains the further statement:

"Mr. Dignan was shown this appraisal at the time he dedicated the right of way and waived any damage that might be caused to his property by the construction of this road."

The aforementioned report of the Division of Highways also has attached thereto a blue print which purports to show the following dedication over the signature of the claimant, to wit:

"We the undersigned being the owners of premises described in the caption hereon and shown as public highway on the plat hereon drawn, hereby grant to the public a perpetual easement over same for use for highway purposes and hereby forever release any and all claims for damages sus-

dedicated by us or either of us by reason of the opening, improving and widening of said premises for highway purposes."

It is true that claimant stated that he did not sign such dedication, and that the signature thereto purporting to be his signature is a forgery, but there is no evidence in the record to corroborate his testimony. The execution of the dedication appears to be duly acknowledged before a Notary Public and the same has been duly recorded.

Our Supreme Court has held in numerous cases that where a deed has been acknowledged and contains the certificate of an officer authorized by law to take acknowledgments, the certificate of the officer showing that the deed was executed and acknowledged by the grantor, cannot be overcome or impeached by the testimony of the grantor alone. *Jaworski vs. Sujewicz*, 334 Ill. 19; *Holmes vs. First Union Tr. & Srg. Bank*, 362 Ill. 44; *Dombro vs. Hugo*, 370 Ill. 381.

Furthermore, there is other evidence in the record to indicate that the signature in question is the genuine signature of the claimant.

The evidence in the record fails to establish the right of the claimant to an award, and the motion of the Attorney General must therefore be sustained.

In the view we take of the case, it becomes unnecessary to consider the second point raised by the Attorney General.

The motion of the Attorney General to dismiss is allowed. Case dismissed.

(No. 3331—Claimant awarded \$75.00.)

A. L. POTTS, M. D., Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 9, 1939.

Claimant, pro se.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

SERVICES—*when award may be made for.* Where physician rendered professional services to employee of State, injured in an accident, arising out of and in the course of his employment, while engaged in extra hazardous employment, at the instance of authorized officer of State, and for which State was liable, an award will be made for the reasonable of same.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

The claimant, A. L. Potts, M. D., who is a practicing physician and surgeon residing at Gibson City, Illinois, filed his complaint herein on November 16th, 1938, and therein asks for an award of \$97.00 for medical and surgical services rendered between December 26, 1934 and June 21, 1935, to one Louis F. Thompson, maintenance patrolman for the Division of Highways of the respondent.

It appears from the report of the Division of Highways filed herein on March 18th, 1939, that on December 26th, 1934 Thompson sustained accidental injuries which arose out of and in the course of his employment; that he was removed to Paxton Community Hospital at Paxton, Illinois, for treatment; that he was attended by the claimant while at the hospital, and thereafter at his home; that the services rendered by the claimant were authorized by the District Engineer of the respondent; that on August 1, 1935 claimant submitted a bill for his services in the amount of \$84.00; that same was returned with the request that the charge of \$50.00 for an operation on December 26, 1934 be reduced, and that no reply was made to such request.

On November 16th, 1938 claimant filed his complaint herein, and on March 23d, 1939 he filed a voluntary reduction of his claim and agreed to accept the sum of \$75.00 in full settlement thereof. Settlement for such amount has been approved by the Examining Committee of the Department of Finance which passes upon the reasonableness of fees in claims of this kind.

It is admitted that the services in question were authorized by the proper authorities of the respondent; that they were rendered as claimed, and that they are reasonably worth the sum of \$75.00.

There was no unreasonable delay in filing the claim, and there is no reason why the claim should not be allowed.

An award is therefore entered in favor of the claimant for the sum of Seventy-five Dollars (\$75.00).

(No. 3109—Claimant awarded \$6,500.00.)

GEORGE F. KRAMER AND LOUISE KRAMER, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 10, 1939.

J. E. BAIRSTOW, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

PROPERTY DAMAGE.—construction of public highway, causing—measure of. Where private property is not taken for public use, but is damaged by reason of the construction of a public highway, the proper measure of damages is the difference between the fair, cash market value of the property, unaffected by the improvement, and its fair, cash market value as affected by it.

SAME—same—proper elements of. Where grade of road upon which private property abuts is changed in the construction of a public highway, resulting in interference with right of access to said property, thereby depreciating the fair, cash market value thereof, such interference is a proper element of damages.

SAME—same—depreciation in market value—must be from cause which law regards as basis for damages—when award may be made for. Where it appears from the evidence that in the construction of public highway, grade of same was changed to such an extent that access to property of abutting owner was interfered with and substantially reduced, resulting in owner being deprived of the use of certain space in his building and causing surface water from said highway to drain into said building, same constitutes damage to property within meaning of Constitution, and if the fair, cash market value of same, is found to be, as a result of the construction of such highway, less than at, or just prior to such construction, an award for the difference, as shown by the evidence may be made.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

In May, 1927, claimants purchased a tract of land within the corporate limits of the Village of Fox Lake, having a frontage of 220 feet on the public highway which is now known as S. B. I. Route No. 60, and extending westerly to Pistakee Lake a distance varying from ninety (90) feet at the north end to One Hundred Thirty (130) feet at the south end of the property. Such tract is located about two blocks from the railway station and the main business block in Fox Lake, and at the time of the purchase thereof by claimants, and continuously since that time, has been used for the purposes of a boathouse and boat works.

The land is situated on what is known as the Chain of Lakes, which furnishes a waterway from Wilmot, Wisconsin,

to McHenry, Illinois, by way of the Fox River from Wilmot, through Long Lake, Petite Lake, Bluff Lake, Lake Catherine, Channel Lake, Lake Marie, Grass Lake, Fox Lake, Nippersink Lake, Pistakee Lake, Pistakee Bay, and Fox River, as far as the dam below McHenry.

On account of its location, claimants' property is peculiarly suited to boat works and boat house purposes, and is one of the four pieces of property in that vicinity which has a frontage on both the State highway and the lake. S. B. I. Route No. 60 is the only hard-surfaced highway connecting that entire lake district.

The use of motor boats in the vicinity of Fox Lake and the Chain of Lakes region has increased very materially since claimants purchased said property. Although the population in the immediate vicinity of Fox Lake is normally about 1,000, it is increased to 18,000 or 20,000 during the summer season.

Claimants paid \$20,000.00 for the property, which at that time had several buildings thereon. In the fall of the year in which the property was purchased, claimants constructed another building thereon, at a cost of approximately \$3,000.00, constructed a retaining wall at a cost of \$600.00, and installed certain machinery at a further cost of \$1,000.00 to \$1,200.00. The land is now improved by the following buildings, to wit: the North Building, which is a metal building 89.5 feet by 56 feet;—adjoining such building on the south is a covered shed 55 feet by 23 feet, and immediately south of such covered shed is a metal building 55 feet by 32 feet. A short distance south of the latter building is a concrete building, the main portion of which is 90.5 feet by 48.2 feet, with an extension on the south approximately 27 feet by 29 feet. At the southeast corner of such concrete building is a small frame building 24.3 feet by 20.3 feet.

The large concrete building has a concrete floor; the small frame building has a wooden floor, and the other buildings have no floors. The two large buildings, to wit, the most northerly building and the most southerly building, are located practically on the west right-of-way line of S. B. I. Route No. 60.

Claimants' property is bounded on the north by other private property, on the east by S. B. I. Route No. 60, on the

south by the channel connecting Pistakee Lake with Nippersink Lake, and on the west by Pistakee Lake.

One of the witnesses for the respondent stated that claimants' property is the finest boat works property on the whole Chain of Lakes; that there isn't anything to compare with it, situated as it is at the gateway to the lakes and to the channel.

Prior to the month of January, 1935, the highway which is now known as S. B. I. Route No. 60 was a gravel-surfaced road, and was on substantially the same level as the property of the claimants, the north property line being practically level with the roadway, and the south property line being about eighteen (18) inches below the level of such roadway.

Prior to said date (January, 1935) claimants maintained a filling station adjoining their south building, but within the limits of such highway, and also used for storage purposes the portion of such highway adjoining their buildings, which was not used by the public for travel.

In the month of January, 1935, the respondent commenced the construction of a new bridge across the aforementioned channel connecting Pistakee Lake with Nippersink Lake, the elevation of which bridge was considerably higher than that of the old bridge, and therefore necessitated the raising of said State highway above its previous level. The work of construction was commenced on January 21, 1935, and completed on June 24th of the same year. The entire improvement consisted of a concrete bridge and a concrete pavement forty (40) feet in width, extending in both directions from such bridge.

A comparison of the elevation of the present concrete highway with that of the original highway shows that at the north line of claimants' property the concrete highway is five (5) feet above the level of the original highway; at a point One Hundred (100) feet south of the north line of the property, the concrete highway is six (6) feet above the level of the original highway, and at claimants' south property line the concrete highway is about four and one-half ($4\frac{1}{2}$) to five (5) feet above the level of the original highway.

In constructing the hard-surfaced roadway, the center line thereof was moved approximately twenty (20) feet closer to the claimants' property than it previously had been. By reason of the elevation of the bridge and highway, it has be-

come impossible to pass directly from the highway to claimants' property, and in order to afford a means of access thereto, a ramp was constructed immediately adjoining claimants' east property line and within the highway right-of-way, so that the only means of access to claimants' property by vehicle is from the north and extending in a southerly direction along the east side of claimants' buildings. A set of concrete steps has been constructed at the north end of the bridge, thereby affording access from claimants' property to the sidewalk across the bridge.

Claimants' property was used as a boathouse and boatworks for many years prior to the time they purchased the same, and it is conceded that its use for such purposes is the highest and best use to which the property was and is adaptable. Prior to the elevation of the roadway, the door to the most southerly building was on the east side of the building, adjoining the highway, and an overhead hoist had been constructed in the rear of the building. A large number of boats were launched from claimants' property, being transported thereto by truck or trailer. It was possible to back the trucks directly from the highway into the building, and under the hoist. The boats were then attached to the hoist and conveyed directly from the truck to the Lake. The elevation of the highway has made this procedure impossible. Claimants were required to change the entrance to their building from the east to the north side thereof, and although it is still possible to use the building, the means of access thereto is much less convenient than it previously was, and there is also considerable difficulty in the use of the aforementioned hoist.

Instead of backing directly from the highway into the east door of claimants' building, as heretofore, it is now necessary to proceed to the north end of the property, then down the ramp to claimants' most southerly building, enter the same from the north, and get under the hoist in the best manner possible under the circumstances.

The evidence also shows that on account of the change in the entrance to the south building, claimants were deprived of the use of a certain amount of space within the building, and also between the south building and the adjoining building, which had theretofore been used for storage purposes.

Prior to the elevation of the highway, claimants had not been bothered in any way by water in their buildings. Since

the elevation of the highway, and particularly during wet seasons, surface water from the highway comes down the ramp, and also over the shoulder of the highway, onto claimants' property and into their buildings, causing considerable difficulty, particularly in those buildings which have no floors. There was also evidence to the effect that the presence of water in the buildings caused the rusting of metal parts.

The improvement in question was confined within the limits of the pre-existing highway, and none of claimants' property was taken in the making of the improvement. Claimants contend, however, that their property has been damaged for public use, and that under the provisions of Section 13 of Article II of the Constitution, they are entitled to just compensation therefor.

Where private property is not taken but is damaged for public use, the property owner is entitled to recover the damages which his property has sustained, and the proper measure of damages in such case is the difference between the fair cash market value of the property unaffected by the improvement, and its fair cash market value as affected by it. *Dept. of Public Works vs. McBride*, 338 Ill. 347; *Dept. of Public Works vs. Caldwell*, 301 Ill. 242; *Brand vs. Union Elevated Co.*, 258 Ill. 133; *Grassle vs. State*, 8 C. C. R. 150; *Stein, et al. vs. State*, 8 C. C. R. 251; *Moore, et al. vs. State*, 8 C. C. R. 686.

However, depreciation in market value will not sustain a claim for damages to land not taken, unless it is from a cause which the law regards as a basis for damages. *Illinois Power and Light Corporation vs. Talbott*, 321 Ill. 538; *Rockford Electric Co. vs. Browman*, 339 Ill. 212; *Moore, et al. vs. State*, 8 C. C. R. 686.

The proper elements of damage which may be considered in determining whether there has been a depreciation in the market value of property were reviewed by our Supreme Court in the case of *Illinois Power and Light Corporation vs. Talbott*, 321 Ill. 538. In that case the court, on page 547, said:

"It is clear that the provision in the constitution of 1870 was not intended to reach every possible injury that might be occasioned by a public improvement, and that to warrant a recovery it must appear that there has been some direct physical disturbance of a right, either public or private which the plaintiff enjoys in connection with his property and which gives -- an additional value, and by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by

the public generally. The physical disturbance need not be a physical disturbance or direct injury of the tangible object of property rights, but must be a disturbance of a right which the owner enjoys in connection with his ownership of the tangible object."

This statement of the law has been approved in numerous cases since decided. *Illinois Power and Light Corporation vs. Wieland*, 324 Ill. 411; *Illinois Power and Light Corporation vs. Barnett*, 338 Ill. 499; *Rockford Electric Co. vs. Brownman*, 339 Ill. 212.

The evidence abundantly shows that as the result of the improvement there is a material interference with claimants' right of access to their property; a lessening of rental value; a loss of storage space in buildings and on claimants' vacant property; and also that at certain times there is a flow of surface water onto the premises and in the buildings, which interferes with operations and causes metal parts to rust, which conditions did not exist prior to the making of the improvement.

Five witnesses besides George F. Kramer testified for the claimants on the question of values, and only one witness testified on behalf of respondent. The five disinterested witnesses for the claimants variously fixed the fair cash market value of the property prior to the making of the improvement from \$22,000.00 to \$30,000.00, and all but one stated that in his opinion the property had been depreciated fifty per cent (50%) as the result of the making of the improvement;—the other disinterested witness fixed the depreciation at 66 2/3%. The claimant, George F. Kramer, fixed the fair cash market value of the property prior to the making of the improvement at \$25,000.00 to \$30,000.00, and stated that in his opinion the value had depreciated two-thirds as the result of the making of the improvement.

Only one witness testified for the respondent on the question of damages. Such witness stated that in his opinion the property was benefitted as the result of the improvement in question. He also stated, however, that the benefits accruing to the claimants' property as the result of the construction of the highway were such benefits as accrued to the public at large.

Among the items which were considered by the claimants' witnesses in estimating the damage to the property, was the loss of business arising on account of the fact that claimants were no longer able to maintain their oil pump and therefore

had to remove the same. It appears, however, that such pump was located upon the public highway, and consequently any loss of business resulting from the removal thereof is not an item of damage for which the claimants are entitled to recover in this proceeding.

Another element of damage considered by some of claimants' witnesses was the loss of storage space between the claimants' building and the traveled portion of the highway, which space was eliminated by the change in, and elevation of the roadway. Claimants' buildings are constructed practically upon their east property line, and inasmuch as this storage space was located upon the public highway, claimants have no right to recover any damages as the result of their inability to use the same.

Under all of the testimony in the record, we feel that the damage to the claimants' property, based upon the elements which are properly considered in determining such damage, is Six Thousand Five Hundred (\$6,500.00) Dollars.

It appears from the record that the claimants' property is encumbered by two mortgages, but the amount now due thereon does not appear of record.

Award is therefore entered in favor of the claimants, George F. Kramer and Louis Kramer, for the sum of Six Thousand Five Hundred Dollars; to be paid only upon delivery by claimants to the proper authorities of the respondent, of a release or releases duly executed by all persons, firms or corporations holding liens on said property on January 21st, 1935, the date of the commencement of work on the improvement, releasing the respondent of and from all claims and demands of every kind and nature arising out of or as the result of the construction of the aforementioned improvement.

(No. 2590--Claim denied.)

ANGELINE GOODMAN, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 15, 1937.

Rehearing denied May 10, 1939.

LYLE K. WHEADON, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TERRY, Assistant Attorney General, for respondent.

DEDICATION OF PROPERTY FOR PUBLIC USE—*effect of deed of.* Where private property, is acquired by deed of dedication, for purpose of construction of

public road, containing release of damages, which might be occasioned to property of grantor by reason of construction and maintenance of said road, instead of by condemnation, the payment of the consideration agreed upon, has the same effect as the assessment of damages in condemnation proceedings, and includes damages to property not conveyed under deed, which results from proper construction of said road, and all past, present and future damages which the improvement may thereafter reasonably produce.

SAME—damage to part of not acquired by deed of—claimed as result of public improvement—constructed in accordance with plans—when award for denied. Where claimant by deed of dedication, conveyed a portion of her land to State for purpose of construction of public road, containing release of damages, which might result to her property, by reason of the construction or maintenance of same, and road is properly constructed in accordance with plans and specifications for same, which appear to have been presented to committee representing grantor, the conveyance will be held to be a release of all damages, including those to property not conveyed thereunder, which result from the construction of the road, or the maintenance of same, and an award for damages must be denied.

EVIDENCE—contention deed of dedication, containing release of damages, not binding—that improvement not constructed in accordance with plans—burden of proof on one making. Where one asserts that a deed of dedication of property for public use, containing a release of all damages to all property of grantor, that might result from construction of public improvement received in evidence, is invalid and not binding, because of misrepresentations made to grantor and that improvement was not constructed in accordance with plans submitted therefor, he must prove same by a preponderance or greater weight of the evidence, and if he fails to do so, grantor in deed is bound by same and release of damages contained in or forming part thereof.

NEW TRIAL—newly discovered evidence—when rehearing will not be allowed on. A motion for new trial or rehearing, on the grounds of newly discovered evidence will not be granted where the same could have been discovered before the trial by the exercise of due diligence, and where no facts are alleged from which it appears that the newly discovered evidence could not have been discovered before the trial, and no reason is shown why such evidence was not produced at that time, motion must be denied.

DEED OF DEDICATION—without acknowledgment—valid between the parties. In the absence of any other evidence invalidating same, deed of dedication signed by grantor, is good and valid between the immediate parties, even though not acknowledged by grantor, before officer authorized to take acknowledgments.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On February 5th, 1935 Angeline Goodman, then eighty-two years of age, filed her complaint herein for the recovery of damages which she claimed resulted to her property by reason of the construction of S. B. I. Route No. 95. On De-

cember 15th, 1936 Angeline Goodman departed this life testate, and letters testamentary on her estate were duly issued to Edith Nolan by the County Court of Fulton County, and thereafter, on motion duly made, said executrix was substituted as claimant herein.

The property claimed to have been damaged is situated in the eastern portion of Lewiston, in Fulton County; consists of approximately four acres, having a frontage of about two hundred yards on the south side of S. B. I. Route No. 95, and is improved by a five-room bungalow which is situated on the northwest corner of the property. S. B. I. Route 95 extends in an easterly direction from the City of Lewiston, and prior to the time it became a part of the hard road system of this State, was a dirt road and was known as Avenue E.

The Goodman property is located at the crest of a hill, and the highest point of said property is directly in front of the house. The dirt road had previously been excavated to such an extent that the surface thereof was approximately fourteen feet below the crest of the hill. Before the construction of the hard road the occupants of said property had access thereto by means of a road which extended in a southerly direction from Avenue E just west of the house.

In the work of the construction of such hard road, a further excavation was made, and the crest of the property in question is now approximately twenty feet above the surface of said roadway. The cut was so deep that the private roadway just west of the house had to be abandoned, and the State constructed another entrance to the property, approximately two hundred fifty feet east of the house, extending in a southerly and southeasterly direction to the rear of the house. Prior to the construction of the hard road, the occupants of such property had mail delivery from the local post-office, but after the construction of such road, mail delivery was abandoned by the postoffice authorities on account of the inaccessability of the property.

Claimant contends that by reason of the construction of the hard road, the property has been materially damaged by reason of interference with the means of ingress and egress, by erosion, loss of free mail delivery, and the destruction of several trees.

Prior to the time the hard road was constructed, another location therefor was under consideration by the highway

department. The public-spirited citizens of Lewiston were anxious to have the road laid out on Avenue E, and at a mass meeting of property owners held in the court house, a committee of local men was selected for the purpose of obtaining the necessary rights-of-way and releases of damages from abutting property owners. On account of her advanced age, Mrs. Goodman did not personally look after her interests in connection with the construction of the roadway, but was represented by her son-in-law, John Thorn.

The contour of the ground on the Goodman property slopes abruptly to the north, and on account of the depth of the cut, and the resulting slope of the embankment, it became necessary to acquire additional right-of-way in front of the Goodman residence.

Before the work of construction was commenced, Angeline Goodman signed a deed of dedication of right-of-way for public road purposes, conveying the additional land required by the respondent as aforesaid, and also signed a release of all damages of every kind and nature which might be occasioned to her said property by reason of the construction and maintenance of said S. B. I. Route 95. Both instruments were in the form prepared by the highway department, were under seal, and signed by Angeline Goodman by her mark, and were witnessed by her son-in-law, John Thorn.

The Attorney General contends that the plaintiff is not entitled to an award on account of the fact that any damages she may have sustained are barred or released by the deed of dedication and the release agreement executed by her as hereinbefore set forth.

In answer to such contention, the claimant says that after said contract and release of damages had been signed, the plans were either changed, or the cut in front of the Goodman property was made to a greater depth than was provided in such plans, and that therefore the said deed and release do not bar the claimant from an award.

Claimant's right of recovery is based upon the following:

1. The property in question was damaged as the result of the carelessness and negligence of the representatives of the State connected with the highway department.
2. On the grounds of equity and good conscience.
3. Upon the constitutional provisions that private property shall not be taken or damaged for public use without just compensation.

These contentions will be considered in the order above set forth:

1. This court has repeatedly held that in the construction of its hard-surfaced roads, the State is engaged in a governmental function. *Goldie Ryan vs. State*, 8 C. C. R. 361; *Elsie Baumgart vs. State*, 8 C. C. R. 220; *Chumbler vs. State*, 6 C. C. R. 138; *Bucholz vs. State*, 7 C. C. R. 241; *Braun vs. State*, 6 C. C. R. 104; *Loges vs. State*, 8 C. C. R. 53; *Johnson vs. State*, 8 C. C. R. 67; *Trompeter vs. State*, 8 C. C. R. 141; *Lester Royal vs. State*, decided at the September 1935 term of this court.

Our Supreme Court has consistently held that the State, as well as counties and other political subdivisions of the State, in the exercise of their governmental functions, are not liable for the negligence of their servants and agents, in the absence of a statute making them so liable. *Minear vs. State Board of Agriculture*, 259 Ill. 549; *Hollenbeck vs. County of Winnebago*, 95 Ill. 148; *City of Chicago vs. Williams*, 182 Ill. 135; *Gebhardt vs. Village of LaGrange Park*, 354 Ill. 234.

2. The question of the liability of the State on the grounds of equity and good conscience alone was fully considered by this court in the case of *Crabtree vs. State*, 7 C. C. R. 207, where, after reviewing the previous authorities on the subject, we held that this court has no jurisdiction to allow an award in any case unless there would be a legal liability on the part of the State, if the State were suable. The decision in the Crabtree case has been approved by this court in so many cases since that time that the citation thereof is superfluous.

3. Under the provisions of Section 13 of Article 2 of the constitution, however, if private property is taken or damaged by the State for public use, the property owner is entitled to be compensated therefor, and in this case the claimant is entitled to an award unless the right thereto has been barred by the aforementioned deed of dedication and the aforementioned release of damages.

D. M. Costello, State Highway Engineer, engineer of design for the district in question, testified that although there had been some change made in the plans during the design of the road, yet when the final plans were prepared, no change was thereafter made therein, and that such plans as finally prepared, were the plans which were presented to the local

committee which was in charge of securing the rights-of-way and release of damages. The testimony for the respondent also showed that there was no change in the grades or alignment in front of the Goodman property during the work of construction, and that the road was graded exactly according to the plans.

The witnesses for the claimant did not agree among themselves in their understanding of what the plans provided. This probably arose from the fact that the several members of the Citizens Committee were not all present at the various meetings with the representatives of the highway department, some being present at one time and some at another. However, one question upon which they seemed to agree was that the cut in front of the Goodman property as actually made, was greater than they anticipated it would be. Mr. Groat, a member of the Citizens Committee, testified that he was under the impression that the cut was to be about eight feet. Mr. J. T. Holmes, another member of the committee, testified that he was under the impression that the cut was to be about six or seven feet; Mr. Fouts, another member of the committee, testified that his idea was that the cut was to be about four to six feet. Mr. Dobson, another member of the committee, testified that his idea was that the cut was to be about three to four feet. As a matter of fact, the cut as actually made at the deepest point, was approximately seven feet; that is to say, no greater than two of the members of the committee understood it was to be, although it afterwards appeared to them to be considerably deeper.

No one connected with the State Highway Department talked to Mrs. Goodman regarding this matter, or made any representations to her, and consequently if she was misinformed regarding the provisions of the plans, it must have been by some member or members of the Citizens Committee. It may be that the members of the committee did not properly understand the plans, and apparently the cut when completed was deeper than they anticipated it would be, but nevertheless, the weight of the evidence indicates that there was no change in the final plans for the work, and that the improvement was constructed and completed strictly in accordance with the final plans which were prepared and presented to the Citizens Committee prior to the execution of the deed of dedication and release of damages by Mrs. Goodman.

The deed of dedication and release in question were offered in evidence by the respondent, and if they were not binding upon the claimant by reason of any misrepresentations made to Mrs. Goodman, or if the improvement was not constructed in accordance with such plans, the burden was upon the claimant to establish such facts.

From a careful reading of all of the evidence, we are of the opinion that the claimant has failed to establish either of such propositions, and that therefore the claimant is bound by such deed and release of damages.

The release in question was objected to by the claimant for the reason that the same was not dated. It appears, however, that same was acknowledged before a Notary Public on August 13th, 1932. The grantor Angeline Goodman apparently signed by her mark, which was witnessed by her son-in-law, John Thorn. Under the evidence in the record, the release was properly admitted.

This court has heretofore held that where there is a deed of dedication, the legal effect of such deed is the same as a judgment in condemnation; that the consideration for the conveyance constitutes a release of all damages, including damages to property not conveyed, which results from the proper construction of the road in question. *Fred Baber vs. State*, No. 2221, decided at the November 1935 term of this court; *Lampp vs. State*, 6 C. C. R. 349.

This holding is in accordance with the decisions of our Supreme Court. *C. R. I. & P. Ry. Co. vs. Smith*, 111 Ill. 363; *Atterbury vs. C. I. & St. L. Ry. Co.*, 134 Ill. App. 330. See also 2 Lewis Eminent Domain, 2d Edition, page 702, Section 293.

Under the provisions of such release, said Angeline Goodman, for herself, her heirs, executors, administrators and assigns, forever released the respondent from all damages of every nature and description that might be occasioned upon or to the Goodman property by reason of the construction and maintenance of said S. B. I. Route 95. Under the terms of such release, the claimant is barred from any right to an award by this court.

Award denied. Case dismissed.

SUPPLEMENTAL OPINION ON PETITION FOR REHEARING.

Per Curiam:

This cause again comes before the court upon claimant's petition for rehearing, in which she sets forth eleven par-

particulars wherein the court is alleged to have erred.

The first, second, fifth, eighth and eleventh grounds for rehearing are to the effect that the court failed to give adequate consideration to the testimony of certain witnesses for the claimant.

The third ground is based upon the statement that since the claimant's case was closed, new evidence had been discovered, to wit, the testimony of the physician in charge of said Angeline Goodman at the time the deed of dedication and release in question were signed by her, to the effect that said Angeline Goodman was then so ill and bedfast to such an extent that she could have had no knowledge of such instruments or the purport thereof.

The fourth ground consists of an offer to show that no one ever had any power of attorney or authority to act for said Angeline Goodman, and that the dedication and release in question were never personally notarized in the presence of the claimant, nor did the Notary Public ever personally take her acknowledgment.

The seventh and tenth grounds are that the acknowledgments of the deed of dedication and the release were false and fictitious; that said Angeline Goodman never appeared before the Notary Public, nor he before her; and that such deed and release were improperly admitted in evidence over claimant's objection, without proof of the execution thereof.

The sixth ground is as follows:

"That the law is clear that where the grade and alignment of a road is changed compensation should be paid."

The ninth ground is that the claimant is entitled to an award on the grounds of social justice and equity.

All of the testimony in the record was carefully considered by the court upon the original hearing, and upon a further consideration thereof, the court fails to find therein anything which would cause it to alter its previous opinion as to the probative effect of the testimony of the several witnesses.

The matter of the mental condition of Angeline Goodman at the time of the execution of the deed and release in question, was first suggested by the claimant in her petition for rehearing, which was filed herein more than five years after the execution of such instruments, and almost a year after the death of said Angeline Goodman.

The deed of dedication was dated and acknowledged on August 13th, 1932; the release was not dated but was acknowledged on August 13th, 1932; both documents were recorded in the office of the Recorder of Deeds of Fulton County, Illinois on August 27th, 1932; Angeline Goodman filed her claim herein on February 5th, 1935; the taking of testimony was concluded on September 30th, 1935; Angeline Goodman died on December 15th, 1936; claimant's Brief and Argument was filed on September 12th, 1936; respondent's Brief and Argument was filed on June 1st, 1937; and claimant's petition for rehearing was filed on October 15th, 1937.

It is well settled in this State that an application for new trial on the ground of newly discovered evidence is not looked upon with favor, and should always be subjected to the closest scrutiny; also that a motion for new trial on the ground of newly discovered evidence should not be granted where the newly discovered evidence could have been discovered before the trial, by the exercise of due diligence. *People vs. Buzan*, 351 Ill. 610; *Graham vs. Hagman*, 270 Ill. 252-261; *Metz vs. Yellow Cab Co.*, 248 Ill. App. 609; *Miller vs. Miller*, 315 Ill. 600; *Nesbit vs. Streck*, 259 Ill. App. 48; *People ex rel Oenke vs. Schuring*, 288 Ill. App. 451.

No facts are alleged from which it appears that the newly discovered evidence could not have been discovered before the trial, and no reason is suggested why such evidence was not produced at that time; consequently, on the showing made, claimant is not entitled to a rehearing on account of any newly discovered evidence.

The same rule applies to the offer to show that no one had a power of attorney, or authority to act for Angeline Goodman; that the instruments in question were not personally notarized, and that the notary did not personally take the acknowledgments. Furthermore, even if such instruments had not been notarized at all, in the absence of any other showing, they would still be good and valid as between the parties. *McNichols vs. McNichols*, 299 Ill. 362-368; *Callaghan vs. Callaghan*, 359 Ill. 52-59; *Doane vs. Baker*, 120 Ill. 308.

Upon the original hearing on July 2d, 1935, the documents in question were offered in evidence and the following objection was made to their admission, to wit:

"Enter the objection of the claimant to the offer of the exhibits on the ground that such are incompetent, not properly notarized, and no one

in fact with the signing of same has proven the signatures either of the notary or the party thereto, and that there is no proof by the witnesses to the mark of the claimant regarding same. One more objection that the respondent's exhibit No. 2 (the release) is not dated as to time of signing."

Both documents purported to be signed by Angeline Goodman by her mark; both were properly witnessed; both were in regular form and duly acknowledged, and no suggestion was made at the time they were offered in evidence that said Angeline Goodman did not sign the same, or that she was not of sufficient mental capacity to execute the same.

There is no basis in law for the claim which was made on the trial and which is now made, to the effect that the documents were not admissible in evidence without proof of the execution thereof by Angeline Goodman. The statute provides (Ill. Rev. Stat. 1937, chap. 30, sec. 35):

"Every deed, mortgage, power of attorney, conveyance, or other writing, either concerning any lands, tenements, or hereditaments which, by virtue of this Act, shall be required or entitled to be recorded as aforesaid, being acknowledged or approved according to the provisions of this Act, whether the same be recorded or not, may be read in evidence without any further proof of the execution thereof"; etc.

Claimant seems to take the position that the release in question is not a "deed" and therefore not entitled to be recorded under the foregoing provisions. Such a construction is not warranted by the decisions. The term "deeds" is not limited to deeds of conveyance, but includes all instruments under seal. 2 Words and Phrases, page 1920; 18 Corpus Juris 146; 1 Pope's Legal Definitions, 356, and cases there cited.

On the original hearing there was no denial of the execution of either of the instruments; they purported to be properly signed and acknowledged, and were therefore properly admitted in evidence.

The sixth ground relied upon is a general statement, which, under the facts in the record, is entirely without merit.

The right of the claimant to recover on the grounds of social justice and equity was fully considered on the original hearing.

There is nothing in the petition for rehearing which entitled the claimant to the further consideration of the case by the court, and nothing which would cause the court to change the views expressed in its original opinion;—consequently the petition for rehearing is denied.

(No. 3080—Claimant awarded \$1,544.20.)

H. G. GOELITZ COMPANY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 10, 1939.

MARKMAN, DONOVAN & SULLIVAN, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

CONTRACTS—compensation for extra work not provided in—due to material change in plans and specifications forming part of—when award for may be made. Where claimant, party to contract with State, for construction of part of public highway, is obliged to do extra work, in performance of same, due to material changes in plans and specifications forming part of said contract, an award for the reasonable value of same may be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

On February 8, 1934 a contract was entered into between respondent through its Department of Public Works and Buildings and the claimant, whereby the latter in consideration of the recitals therein, agreed to furnish the materials and labor necessary to construct a section of asphalt pavement on a portland cement concrete base forty (40) feet wide on S. B. I. Route No. 18 in the City of Chicago, in accordance with the specifications and proposal previously signed by the respective parties. The improvement in question began near the intersection of North Clark Street and Lincoln Park west and extended in a northerly direction for a total distance of two thousand three hundred eighty-five (2,385) feet. The work under this original contract was entirely completed by the claimant and no question arises as to the work done thereunder. This claim is for additional work that was not included in the original plans.

On May 10, 1934 the claimant was authorized and directed to remove existing concrete safety island at the intersection of Clark Street and Ogden Avenue, and to construct new islands according to revised plans which were submitted with the authorization by the Division of Highways. This extension did not adjoin the improvement covered by the original contract but was located approximately four hundred fifty (450) feet south of the southern end of the original proposed improvement. This additional work involved a different type of machinery and labor to that necessitated by

the work in the original contract. This additional work was in a comparatively new pavement, consisting substantially of three and one-half ($3\frac{1}{2}$) to four (4) inches of sheet asphaltic wearing course laid on approximately eight (8) to ten (10) inches of exceedingly good concrete base, whereas the excavation work included in the original proposal was of a considerably lighter character. Such excavation work on the additional project could not be done by the use of any power shovel without first loosening the pavement that was to be removed. The Board of Underground Work of Public Utilities of Chicago objected to the use of heavy breaking machinery for breaking up the pavement at this site because of the possibility of destroying underground utilities thereunder. Claimant used air compressors and air hammers to remove the concrete. The cost of excavating covered by such extension or additional work was considerably more than for the original type of excavation contained in the proposal and specifications originally made.

At the time claimant was requested to do this additional work he protested to the engineer in charge, Mr. Arnold, that the work was so materially different from that contemplated in the original contract, claimant did not believe that such work should be paid for under the item of "Special Excavation," appearing in the specifications. No definite agreement was made as to the terms of payment and claimant continued to perform the work as requested. The contractor and the State were both to keep an accurate record of the work done for such additional work. Claimant's record of such work is taken from his time-books and pay-roll records. The Division of Highways Engineers kept an accurate time and equipment record for the work in question and their report varies somewhat from that of the claimant. This is explained by the fact that part of the additional work was being done at the same time claimant was engaged in the work under the original contract, and some of the men worked back and forth between the two jobs. It would of course be more difficult to figure out their division of time from a pay-roll record than it was for the highway engineers to keep a time sheet on the one job alone. Claimant has also charged time against the supplemental work for certain foremen, but as these foremen were necessarily employed by claimant in the course of the general work which they were doing, there is no justification for

allowing additional credit for any supervision which they gave to this portion of the work. In addition thereto, the record discloses that it was not necessary for these foremen to put in their time on the extension work for the reason that the air hammers and compressors were operated by an air compressor engineer and his operators which did not need a foreman to supervise the work other than such supervision as the State Highway Engineer might give; further, that under the specification and conditions existing, no cause appeared for the additional service of such foreman. The claimant was paid at the contract unit rate for all the work done, including the additional work called for under the extension or supplemental plans. A final estimate was made and claimant accepted the warrant issued as a result of same. Such acceptance was conditional however and claimant notified the highway department under date of November 5, 1934 as follows:

"In checking over the final estimate on the above mentioned route and section, please be advised that we accept final measurements and amounts due on the various extra items as satisfactory, with the reservation that this final estimate be re-opened to allow payment of a claim by the State of Illinois for additional expense incurred by us in constructing Safety Islands and in revising intersection of Ogden Avenue and Clark Street. Also, to allow the State of Illinois a credit for the difference in price of asphalt used in the binder course of the wearing surface."

In a letter under date of November 19th District Engineer Harger notified his superior Mr. C. M. Hathaway, Construction Engineer of the Division of Highways, in regard to allowing extra compensation, as follows:

"The work involved is entirely outside of the limits of the contractor's original contract. In fact, it lies approximately four or five hundred feet south of the south end of the original contract * * *. When he started to work he found out that the class of work was entirely different than what the original contract called for * * *. At the time, the contractor protested verbally with our Department and insisted that he should be allowed cost plus for the work as it was not comparable to the excavation he bid on."

Mr. Harger further stated that this work should not be confused with special excavation work on the original contract.

The Attorney General contends that because of the provisions of Article 9.7 of the standard specifications for road and bridge construction, the acceptance of the final payment for work performed under the original contract should act as a bar to any further payment to the contractor for the work

in question. We do not believe that the supplemental or additional work for which claim is here being made was a part of the original contract, and can see no reason why claimant should have found it necessary to decline acceptance of payment for the work which it had fully completed under the original contract, in order to preserve its claim for compensation for the additional work performed under a separate contract. The work for which a claim is here being urged was not contemplated in the original contract, was at some distance from the work originally contracted and of a character demanding a different manner of handling. The engineers for respondent have stated that this work should not be classed as special excavation under the original contract but should be paid for under a cost-plus basis.

The cases of *Urech vs. State*, 8 C. C. R. 212 and *Illinois Steel Bridge Company vs. State*, 7 C. C. R. 76 do not, we believe, apply to the present situation. Section 4.4 of the standard specifications provides, that

"The Department reserves the right to claim such changes in the plans and the character of work under the contract as may be desirable * * * provided such changes do not materially alter the original plans and specifications."

The court finds that the work upon which the present claim is predicated was a material change in the original plans and specifications, and that the respondent is liable for the additional costs incurred by claimant in performing the work, and that such work should be considered as of the nature of "Force Account Work" as referred to in Article 9.4 of the standard specifications.

Without reviewing in detail the evidence as to the amount of work and the hours of labor for which claimant should be compensated, we find from the evidence that the figures of One Thousand Five Hundred Forty-four and 20/100 (\$1,544.20) Dollars, as compiled from the record of respondent's witness Arnold, present a correct total of the amount to which claimant should be entitled on this claim. The deductions from claimant's computation of Two Thousand Two Hundred Seventy-one and 50/100 (\$2,271.50) Dollars are apparently in accord with the facts disclosed by the record of the manner in which the work was actually carried on and in conformity with the rules pertaining to the allowance of compensation for extra labor, and amount to a total

of Seven Hundred Twenty-seven and 30/100 (\$727.30) Dollars, leaving the above balance of One Thousand Five Hundred Forty-four and 20/100 (\$1,544.20) Dollars.

An award is therefore hereby allowed in favor of claimant in the sum of One Thousand Five Hundred Forty-four and 20/100 (\$1,544.20) Dollars.

(Nos. 2531, 2532, consolidated, No. 2531, Claimant awarded \$1,000.00.
No. 2532, Claimant awarded \$1,750.00.)

STEVE CASKY, ADMINISTRATOR OF THE ESTATE OF FRANK CASKY, DECEASED, No. 2531 AND PETER TODOROFF AND MAMIE TODOROFF, No. 2532, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 10, 1939.

H. GRADY VIEN, for claimants.

JOHN E. CASSIDY, Attorney General; GLENN TREVOR, Assistant Attorney General, for respondent.

PUBLIC IMPROVEMENT—damage to property by construction of—measure of. Where private property is not taken for public use, but is damaged by reason of the construction of a public improvement, the proper measure of damages is the difference between the fair cash value of the property, unaffected by the improvement and its fair cash value, as affected by it.

SAME—same—improper element of. Inconvenience to, or loss of business suffered by owners of abutting property, by reason of construction of public improvement, do not constitute damage to property within the meaning of the Constitution, and no compensation can be had therefor.

EVIDENCE—value of property—when price paid for competent. As a general rule the price for which owner paid for property may be put in evidence, where it appears that he purchased it within a time so recent, that its cost will afford a fair indication of its present value.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Frank Casky, by his attorney, filed his complaint herein on October 31, 1934, and later amended it. He avers that he is a resident of the County of Madison and State of Illinois, and the owner of the following described property, to-wit:

Lots numbered Twenty-one (21), Twenty-two (22), Twenty-three (23) and Twenty-four (24), in Block numbered Two (2) Amended Plat of Clover Leaf Addition to Madison, Illinois, as the same appears of record in Plat Book 7 at page 43 in the Office of the Recorder of Deeds of Madison County, Illinois, situated in the County of Madison and State of Illinois,

and that he was the sole occupant of the property which had certain improvements thereon consisting of a one story frame

building with saloon, three living rooms, outbuildings containing three garages and four sheds; that prior to the construction work hereinafter referred to, and since the year 1925, the claimant has occupied the said premises and operated a confectionery and a lunch room thereon, and claimant avers that he did a very lucrative business, making a comfortable living for himself.

Claimant also charges that the State of Illinois, Department of Public Works and Buildings, Division of Highways, was then engaged in the construction of a concrete overhead bridge spanning the tracks of the Litchfield and Madison Railroad and the Nickelplate Railroad on U. S. Highway No. 67 (being also Illinois Highways Nos. 3 and 4) in the County of Madison and State of Illinois, being immediately in front of the property of the claimant; that such construction entails a span of considerable length, together with a fill several hundred feet in length, resulting in an entire obstruction of the view from the property of claimant, and as a result all of said property is on a level thirty feet (30') lower than the usual travel on the overhead bridge; that the United States Highway No. 67 provides a main artery of travel through the State of Illinois, and particularly between many cities in Madison County and in St. Clair County; that hundreds of automobiles, trucks and other vehicles use it daily, many of the drivers and occupants thereof patronizing the business of said claimant; that, after the completion of said project, the traffic on and along said highway will not pass immediately in front of the property of the claimant, but at an elevation of some thirty feet (30') above it; and that it will be impossible for traffic to reach the property of claimant without using the overhead bridge, and that it will be very inconvenient and impracticable for them to do so.

It is also averred that the property was purchased and the improvements thereon erected and constructed at a great cost of money, and that the present value of the property, prior to the commencement of the construction of said overhead bridge, was the sum of \$14,000.00; that the average annual net income from said business was approximately \$1,500.00; that the value of the property and the income therefrom have been greatly reduced since the construction of said overhead bridge; that during and on account of the construction complained of, the walls and ceilings of the improve-

ments on the above described premises have cracked, the doors have jammed, the floors have become warped, and the property has become damaged in other respects.

Claimant further avers that this matter was taken up with Mr. Wilson, who is in charge of the East St. Louis office of the Division of Highways, State of Illinois, who informed the attorney or representative for the claimant that the matter could only be presented to this court; that it was the policy of the Division of Highways not to consider the question of damages to land not taken in such cases, unless part of the land was actually taken. Claimant also charges that he has not received any payment on account of this claim and that no part of the claim has been satisfied.

Claimant further avers that because of the construction of the concrete overhead bridge by the State of Illinois, the claimant will be greatly damaged, on account of reduction in the value of the property, and that he will suffer a severe loss in business, and that he will in many other respects sustain damages, and damages in the sum of \$20,000.00 are asked.

In Number 2532, Peter Todoroff and his wife, as joint tenants, are seeking damages. They are represented by the same counsel and aver that they are the owners of the following described property, to-wit:

Lots numbered Twenty-eight (28), Twenty-nine (29) and Thirty (30) in Block numbered Three (3), Clover Leaf Addition to Madison, as per amended plat thereof, recorded in Plat Book 7 at page 43 in the Office of the Recorder of Deeds of Madison County, Illinois, (except that part thereof heretofore conveyed to the said County of Madison); situated in the County of Madison and State of Illinois;

that said property has certain improvements thereon, consisting of a one story brick building, forty-eight feet long by twenty-four feet wide, containing a lunchroom, a filling station, three living rooms, with a finished basement under the entire structure, and furnace therefor; a one story frame double garage and a one story building adjoining the brick building, being twenty-three feet long by sixteen feet wide and used for saloon purposes; that the brick building was erected in 1929, the garage in 1930 and the saloon building in 1932.

Claimant, Peter Todoroff, further avers that since the year of 1929, he and his wife have operated the filling station and lunchroom on the premises hereinabove described; and

it is claimed that they did a very lucrative business, making a very comfortable living for themselves; that since 1932 they have likewise operated the saloon.

It is charged that the State of Illinois, through the Department of Public Works and Buildings, Division of Highways, was engaged in the construction of a concrete overhead bridge over the same railroad as described in the Casky complaint and over the same highway and immediately in front of the property of the claimants. Facts showing similar damages to those in the Casky case are also averred.

It is charged that the value of the property prior to the commencement of the overhead bridge, was \$17,000.00; that the average annual net income from said business was approximately \$3,000.00; that the value of the property and the income therefrom have been greatly reduced by virtue of the construction of the overhead bridge; that during and on account of the construction of the overhead bridge, the walls and ceilings of the improvements on the premises hereinabove described have cracked, the doors have jammed, the floors have become warped, and the property has become damaged in other respects.

A similar allegation was made as to presentation of this matter to Mr. Wilson, who is in charge of the East St. Louis office of the Division of Highways, State of Illinois.

Claimants further charge that because of the construction of the concrete overhead bridge, the claimants will be greatly damaged, the property will be greatly reduced in value and they will suffer a severe loss in business, and sustain damages in many other respects, and damages in the sum of \$25,000.00 are asked.

In the bill of particulars attached to the complaint in the Casky case, the damage to walls, ceilings and buildings, caused by driving of piles, is placed at \$1,000.00, depreciation in value of property at \$10,000.00, and loss to business at \$9,000.00, or a total of \$20,000.00.

In a bill of particulars attached to the complaint in the Todoroff case, the damage to walls, ceilings and building, caused by driving of piles, is placed at \$2,000.00, depreciation in value of property at \$13,000.00 and loss to business at \$10,000.00, or a total of \$25,000.00.

Both of these claims, founded upon the same facts, have by motion, been consolidated, and we will consider them together.

There is a stipulation to the effect that the State is building a concrete overhead bridge in front of the property of these claims. By an order of the Illinois Commerce Commission, under date of March 27, 1934, it is so stipulated. This order provided that the existing grade crossing of State Bond Issue 3 with the tracks and rights of way of the interested respondent railroad companies at the aforesaid overcrossing location be abolished.

Evidence was offered on behalf of the cost price of the properties and this was objected to. It is the contention of the Attorney General that the damages, if any, are the difference between the fair cash market value of the property immediately prior to the construction of the bridge and immediately thereafter.

In the Todoroff case, Mrs. Todoroff testified that she did not remember when they bought the lots, but apparently it was on October 27, 1926; that they paid \$950.00 for the lots. She testified to several different amounts that they paid for the improvements thereon. She could not say which way the lots faced. She was of the opinion that there was a 50 foot front on Lots 28 and 29, and that they paid \$950.00 for the three lots; that they held them for awhile and then sold 2 of them to the State for \$800.00 (Abst. 6). She further testified that when they built the building they knew that the bridge was going to be built. Her testimony in part is abstracted as follows: "At the time the State bought these lots from me, the hard road was going to be built across the railroad tracks, right across to Madison, just the road, no bridge at all, on the surface, the same level as the tracks. The State said that that was why they bought these lots, for the road. That was what put the idea in my head to build a filling station. They said I would have an independent living. Then they got permission to put that fill in there. They had to get permission to fill that part in there with cinders, after that you couldn't get to our place. We had to fill up the hole before we built our buildings, in order to bring it up to a level with the road in front."

It is not clear from the evidence which lots were sold. It is quite apparent from the evidence that the building of the road was what prompted the claimant, Todoroff, to put in a filling station.

We think, as a general rule that the price which the owner gave for the property may be put in evidence. Lewis on Eminent Domain, Section 444; Mills on Eminent Domain, Section 168. But it must appear that the owner has purchased the property within a time so recent, that its cost will afford a fair indication of its present value. *Lanquist vs. City of Chicago*, 200 Ill. 69, 72.

The difference between the fair cash market value at the time the improvement is made and at the time of the completion of the improvement, is the sum which the owner is entitled to recover as damages. In order to determine such value, evidence may be introduced of sales of similar property in the same neighborhood, but it must appear that such sales were made at or about the time that the improvement was made. This rule was deducted from the rule that in a condemnation suit, in order to determine such value, evidence may be introduced of sales of similar property in the same neighborhood, but it must appear that such sales were made at or about the time of the filing of the petition. *Peoria Gas Light Co. vs. Peoria Terminal Railway Co.* 146 Ill. 372; Lewis on Eminent Domain, sec. 444.

It is quite apparent in this case that the property was purchased in October, 1926, and the claim for damages was not filed until 1934. It cannot be said that evidence as to the cost of the property eight years before necessarily shows the present market value thereof. In the lapse of the intervening years, the value may have risen or fallen to such an extent as to be higher or lower than the purchase price. In 1926 there was evidence of great prosperity in this country and that period of time is frequently referred to as the "peak of prosperity."

Claimant sold two lots to the State for the sum of \$850.00, but she cannot determine exactly by guess work how much of the purchase price was paid for each individual lot, and it is quite apparent that the State bought these lots for the very purpose for which they were used.

In the case of *The Pittsburg, Cincinnati, Chicago and St. Louis Railway Company vs. Gage, et al.*, 286 Ill. 213, it was held that proof of price paid for property pending condemnation is not admissible. There is no evidence in the record as to the rental value of the property for the reason that the property never was rented.

In the condemnation of vacant property, proof of the amount of rents derived from improved property in the neighborhood which had been recently sold, and of the income that could be derived from other vacant property in the vicinity if buildings were erected thereon, is too remote and collateral to be admissible. *Pullman Co. vs. City of Chicago*, 224 Ill. 248.

We, therefore, hold that the profits derived from the sale of gasoline in a filling station and of liquors and luncheons at a lunchroom and saloon are too vague, indefinite and uncertain to be received in evidence.

Peter Todoroff, claimant, further testified (Abst. 9) as to the value of the property and the sale of the two lots to the State for \$850.00. His testimony is quite similar to that of his wife. He testified that he closed up business there because there was no business after the bridge was built. The business came principally from the highways, that is, people travelling along the highway. He testified that when the road was open before the building of the bridge, he did a business of \$20.00 or \$30.00 per day, and that he was doing no other work; that he was just watching the business. He had a saloon, filling station and lunch room. His wife took care of the kitchen and living rooms, and Perigo was watching the saloon. He also testified that as soon as they commenced driving the piling, their walls and ceilings cracked two inches in some places; that there was a crack 48 feet long on a concrete floor, right in the middle of the building, extending from one room to the other; that the doors did not close and before the building of the bridge there weren't any such cracks. Claimant figured that this damage was caused by shaking the ground when they drove the piles. The bridge is about 50 feet away from claimant's property line and the dirt fill is about 30 feet away from it. The bridge is about 30 or 40 feet high at the fill at the closest point to claimant's property is about 30 to 40 feet.

Neither of these claimants testified as to the value of the property before building the bridge or after the bridge was completed.

Frank Casky testified that he is also a claimant and the owner of lots 21, 22, 23 and 24 in Block 2 Amended Plat of Clover Leaf Addition to Madison County, Illinois; that he bought this land in 1923 and built in 1925; that he paid \$800.00 for the lots, and in 1925 put a frame building on the

premises consisting of five rooms, two bedrooms, and a kitchen, two back rooms for business, a saloon, and a few chairs and tables; that the building cost \$3,000.00; that when he purchased the property, it was not on a level with the road; that he paid \$2,000.00 to fill it in with cinders and he testified to many other improvements, such as sidewalks of \$40.00; outside toilets of \$25.00, fence around the property at a cost of \$150.00, and a summer kitchen at \$135.00. The claimant further testified that he spent money for water and that he put on a new roof, and right after he got through, it leaked rain water; that he paid \$60.00 for papering. There were many other items testified to which we cannot consider because we must take this property as a whole, and the value must be determined as hereinbefore announced at the time the improvement was made, and then again when the improvement was completed. The claimant also testified to considerable amount of damages caused by loss of business, and on cross examination he stated that the damages testified to resulted from driving of the piles. On re-direct examination, claimant testified concerning dust storms "when they were putting that dirt in" and said that when the wind was favorable they would have dust storms four or five days of the week. He also testified to great noises at the time of the construction of the bridge to the effect that one could hardly hear anybody talking and that went on from morning to evening.

That since the filing of his claim, Frank Casky has died and his death has been suggested to the court and Steve Casky, as administrator of the estate of Frank Casky, deceased, has been substituted as party claimant.

Lowell Perigo, another witness testified for claimants, that he lived with Todoroff and his wife for about twelve years; that he had always been in the jewelry business except during the time he worked for Todoroff running a saloon. His testimony in the main concerns the physical conditions of the property and loss of business.

This point in the record contains a stipulation that the distance from the ground floor to the main floor of the bridge is 25 feet; that the length of the steel bridge is 610 feet; that the length of the west approach to the bridge is 800 feet, and the height of the fill up to the bridge is 20 feet; that the bridge is constructed of steel girders, a skeleton, with concrete

piers, and that the purpose of the project is to abolish and eliminate the grade crossing at this location.

R. W. Sikking, another witness testified for claimants. He testified that he is in the real estate business in East St. Louis and vicinity and has been so engaged for 40 years; that he has made many appraisals in Madison and St. Clair counties for the Federal Housing Administration, which estimates the values of the properties with the Federal Housing Administration in the counties just mentioned; that he has also made many appraisals in other counties. He testified that the Frank Casky property was best adapted for business purposes, and stated he had an opinion that the fair cash value for that property in 1934 was \$3,800.00, and that the fair cash market value of the same property after the improvement was completed was \$1,800.00. He also testified that he had an opinion as to the fair cash market value of the Todoroff property as of September 1, 1934, and assuming it to be best adapted for business purposes, he was of the opinion it was worth \$7,000.00, and that the fair cash market value of the same property after the improvement was completed was \$2,500.00. He further testified that he had stopped at this property a number of times on the way to a farm that he owned north of Granite City. He testified that in the neighborhood of this property there were twelve or fifteen other houses. He stated that in fixing the value of the property he had taken into consideration all the elements that he could think of, the first element indicating that it would support a business. He also considered the size of the building and examined it and arrived as near as possible at its replacement value, taking into consideration the depreciation and the kind of building it was, and the structure itself. He testified that he took many things into consideration and could not remember all the things he had taken into consideration.

In the case of *Chicago Flour Co. vs. Chicago*, 243 Illinois, 268, at page 271, the Supreme Court of Illinois held:

"It is well settled that inconvenience, expense or loss of business occasioned to abutting owners by the temporary obstruction of a public street, and the consequent interference with their right of access to their property, made necessary by the construction of a public improvement, gives no cause of action against the municipality. The Constitution provides no remedy for the property owner under such circumstances. Such claim is not damage to property not taken, within the meaning of the Constitution." Citing authorities.

The State of Illinois had power to make this improvement. While the law of Illinois is as above announced, we cannot disregard the entire testimony of the witness, Sikking; neither can we give it full credit, because he took into consideration, improper elements. His testimony applied to both claimants and we will take it for what we deem it to be worth.

Witness, Sikking, also testified on cross-examination that from a real estate man's standpoint use was the determining value, and not the possibility of selling, and that for the purpose of a residence, the Todoroff property was just as good as it was before the construction of the bridge, but he would not say that was quite true of the Casky property.

O. E. Hodge another witness for the claimants, testified that he was in the real business in Granite City; that he had offices in Mount Vernon and Cairo, but that most of his business was done in Granite City. The witness testified that he was familiar with the property of the claimants; that he made appraisals of real estate; had been secretary of the Building and Loan Association for nine years, and he estimated that he had made 350 or 400 appraisals. He also testified that his company was the real estate agent for the Prudential Insurance Company of America and made appraisals for them, and had for several years. He placed the value of the Casky property as of September 1, 1934 at \$2,950.00, and after the completion of the improvement at \$1,000.00. He placed the value of the Todoroff property as of September 1, 1934, based upon the use for business purposes, at \$7,200.00, and after the completion of the improvement at \$2,000.00. He stated that the property was rather remotely located but was an ideal location for a saloon. What is said of the Sikking testimony, applies to this testimony.

Robert M. Smith, another witness for the claimants, testified that he lived in East St. Louis and has been in the real estate business for over thirty years in that city. He testified that within the last year and one half he had made appraisals for the Hottes estate, embracing over 90 pieces, and in the last five months for the First National Bank, embracing over 200 pieces; that most of these were city properties. The witness further testified that he was acquainted with the Casky and Todoroff property, and that the best use for which this property was adapted was for a saloon and the attending

features that go with such places. He was of the opinion that before the improvement the value of the Casky property was \$2,500.00, and after the completion of the improvement, \$1,000.00; that the best use of the property would be for residence purposes. He further testified that the walls were cracked, the roof leaked, and the floors and doors were warped. It is very apparent that business was also in his mind as one of the determining factors in fixing the value. He fixed the value of the Todoroff property before the improvement at \$6,500.00, and for business purposes he figured it at a rental of \$50.00 per month. He did not agree with witness Sicking as to depreciation in value, and he fixed the value after the completion of the improvement at \$2,500.00.

C. I. Bergraf, another witness for the claimants, testified that he was Assistant Engineer for the State Division of Highways, located in East St. Louis; that he knew the location of the bridge, and he testified as to local conditions.

C. G. Rogers, another witness for the claimants, testified that he was the Trust Officer for the Illinois State Trust Company and had been for many years, and that he managed the real estate in the course of his employment. He testified that he was familiar with the values of real estate in St. Clair and Madison Counties, and fixed the fair cash market value of the Casky property before the improvement at \$2,500.00, and after the improvement at \$1,000.00; and fixed the fair cash market value of the Todoroff property before the improvement at \$7,200.00, and after the improvement at \$2,000.00 for residential purposes.

Philip H. Cohn, another witness for the claimants, testified that he was a realtor, and had had much experience in the vicinity of this property fixing the value of property. He testified that the Casky property was worth about \$2,950.00 before the construction of the overhead bridge and \$1,000.00 after the improvement was made; that the Todoroff property was worth \$7,000.00 before the construction of the overhead bridge and \$2,000.00 after the construction of the bridge.

Alex S. Vien, another witness for the claimants, testified that he was a resident of East St. Louis and had been for 42 years; that he was engaged in real estate, insurance and loans, and had been in that business for 35 years. He fixed the fair cash market value of the Casky property before the improvement at \$3,000.00 and after the improvement at

\$1,000.00, and the fair cash market value of the Todoroff property before the improvement at \$7,200.00, and after the improvement at \$2,200.00.

P. M. Davidson, testified for the respondent. He testified that he had lived in Granite City for the past eight years, and that he had been engaged in the real estate and insurance business for about twelve years; that prior to moving to Granite City, he lived in Troy and went back and forth. In his opinion, the Casky property was worth, immediately prior to the commencement of the construction of the improvement, \$2,500.00, and was of the same value when the construction was completed. Claimant fixed the value of the Todoroff property at \$4,850.00 at the time of the commencement of the improvement, and of the same value after the commencement of the improvement. He said the Casky property was put to the same use after the improvement as it was before. He took into consideration the cost of construction, its age, and location. In other words, its replacement value. It is apparent that he had given this subject much consideration and study.

J. W. Senoff, testified for the respondent. He testified that he lived at Granite City and had lived there for fourteen years, and had been engaged in real estate and insurance business for eleven years. He also had had much experience in this business. He stated that neither the Casky nor the Todoroff properties are within the corporate limits of Granite City. In his opinion the highest and best use of the Casky property, prior to the construction of the overhead bridge was for a roadside tavern and dwelling, and its fair cash market value for such use, was \$2,500.00, and was of the same value after the improvement. As to the Todoroff property, the highest and best use, would make the fair cash market value \$4,850.00 prior to the construction of the overhead bridge, and after the completion of the overhead bridge, considering the highest and best use, it would have the same value thereafter. He went over this property with Mr. P. M. Davidson and George H. Mueller. They also were real estate men.

Mrs. A. A. Anson also testified for the respondent. She lives at Granite City, Illinois, and has been engaged in the real estate business in Granite City for ten years. She is also acquainted with this property. In her opinion, the Casky property, before the improvement, was worth \$2,200.00 and after the improvement, \$1,400.00. She testified that the value

of the Todoroff property before the improvement, was \$6,000.00 and after the improvement, \$5,400.00.

It will, therefore, be seen that the values placed upon these properties by these witnesses greatly differed. There is much variance in the testimony. The court itself viewed the premises and the surrounding neighborhood.

It has always been held that the State is not liable in the exercise of its governmental functions, for the acts of its servants and agents in the absence of a statute making it so liable, and we have repeatedly held that the State is not liable for the acts of an independent contractor.

We are, however, of the opinion that there has been some damage and we fix the value of the damage done to the Casky property, after careful consideration of all the testimony, and of our own view of the property, and of the law pertaining to the admissibility of evidence, at the sum of \$1,000.00, One Thousand Dollars, and to the Todoroff property in the sum of One Thousand Seven Hundred Fifty (\$1,750.00) Dollars. Therefore an award is made accordingly.

(No. 2288—Claimant awarded \$1,000.00.)

JOHN WALKER, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 10, 1939.

HARRY S. GREENSTEIN, for claimant; HARRY F. BREWER, of counsel.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award for compensation may be made. An award for financial assistance may be made to member of Illinois National Guard, sustaining personal injuries while in the performance of his duties as such member, under authority of Section 11 of Article 16 of the Military and Naval Code.*

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein was a member of the Illinois National Guard and seeks an award in the sum of Four Thousand (\$4,000.00) Dollars under the provisions of the Illinois Military & Naval Code, for injuries alleged to have been suffered while in the performance of his duties as such member.

The record discloses that he enlisted about June 27, 1930, and on February 8, 1933 was a member of the Combat Battery in the 122nd Field Artillery, 33rd Division of the Illinois National Guard; that the training and drilling exercises of the battery were conducted in an Armory maintained by the State of Illinois; that the roof was in bad repair and rain and melting snow would leak through and fall on the floor of the Armory building. While engaged in drill duties the horse which claimant was riding and which had been furnished to him by his commanding officer, slipped on the wet floor and fell in such manner that the horse's weight was on claimant's leg and foot. Claimant suffered four fractures of the left foot. He was taken to the hospital where his injured foot was placed in a cast, in which it remained for about six weeks. Claimant thereafter required the aid of a crutch or cane in walking for a period of four months, and there is now a fixed limitation of motion of the foot and ankle which the evidence shows is probably a permanent condition, and in addition thereto there is a deformity that is commonly known as "flat-foot." Plaintiff's testimony shows that he suffered a great deal of pain during the course of the healing of said injuries, and that he wore an elastic stocking around his ankle and foot for a period of two years, on advice of the attending doctor. Dr. Frank V. Theiss, a member of the National Guard, examined claimant at the time he was injured and attended him at that time. He testified that he saw claimant from time to time after he was discharged from the hospital; that a month or two after claimant left the hospital he attended drill and did not have a cane or crutch but walked with a limp; that he, Dr. Theiss, examined claimant on April 17, 1937 at which time claimant's attorney was present, and that he did not observe any limp upon claimant's part when the latter entered the room. This examination, according to the doctor, disclosed that there was no limitation in the movement of the ankle, and circulation in the foot was normal; that flatfoot is not an infrequent occurrence following injuries of this type. The doctor further testified that he found no limitation in flexion, extension or lateral movement of the left ankle compared with the right ankle; that he caused additional X-rays to be taken and on comparison with the X-rays made four years previously, excellent healing of the fractures was disclosed with no lipping or any abnormal pathological

exostosis. Dr. Theiss explained conflicting opinions as disclosed in the testimony of another surgeon, Dr. Ricardo, by explaining that certain bony enlargements referred to in the latter's testimony involved bones other than those where the fractures occurred, and were merely normal anatomical parts of the structure of claimant's foot. In the doctor's opinion claimant has not lost any part of the use of his left leg. Dr. Theiss saw claimant on the street a number of times and at the Armory frequently. The doctor further testified that flatness of the foot is often due to the laceration of ligaments, tendons and muscles resulting from broken bones of the foot; that if no improvement takes place in the strengthening of such flatfoot within a year no improvement can be expected thereafter; that every precaution was taken in Mr. Walker's case to avoid flatfoot but that it was impossible to avoid some weakening of the arch; that the condition existing would be permanent and would possibly render claimant less able to do heavy work.

Dr. Ricardo testified that he examined claimant in his office on October 9, 1933 not as a treating physician but for the purpose of making a diagnosis; that at that time there was some interference with the blood supply of the lower left leg, a bony outgrowth on the top of his foot on the instep where the fracture of the two bones existed, and a limitation of motion of the ankle joint upon flexion, extension and lateral movement; also a difference of about fifty degrees in the arch of the left and right feet. He next saw claimant four years later on March 7, 1936, at which time he found a slight decrease in the bony outgrowth on the top of the foot; that an atrophy of the muscles of the calf of the left leg existed and the latter was about three-fourths of an inch less in circumference than the calf of the right leg; that he again examined claimant on March 7, 1936, the date of the hearing; that in his opinion the limitation of motion in the ankle and foot, and the condition of flatfoot are all permanent, and that claimant has lost fifty (50) per cent of the use of his foot and leg.

The X-ray examination report of February 9, 1933 at St. Joseph's Hospital in Chicago shows the following fractures:

A fracture involving the internal malleolus of the left tibia.

A comminuted fracture involving the external malleolus of the left tibia.

A comminuted fracture involving the proximal end of the second metatarsal of the left foot, extending into the joint, with fragment displacement.

A fracture involving the proximal end of the third metatarsal of the left foot.

Dr. Theiss further testified that a year after the injury he saw claimant taking an active part in the regimental drills and that the condition of claimant as he, Dr. Theiss, found it in April, 1937, was not such as in his opinion would cause a loss of any part of the use of claimant's leg, ankle or foot. On cross-examination Dr. Theiss qualified this statement however by stating that anyone with a degree of flatfoot will suffer some weakness and fatigue, and that claimant would possibly be less able to do heavy work as a result thereof. Both Dr. Theiss and Dr. W. E. Anspach certified under date of April 10, 1937 to the X-ray examination of claimant, and stated that apparently perfect apposition and alignment have been maintained in the healing of the left ankle, and that good bony union has occurred at the fracture sites with approximately one-half cm. prominence of the proximal end which overlaps the second metatarsal.

With respect to claimant's occupation and work, his testimony shows that prior to the time of the injury in question he was employed as a solderer for the Grigsby-Grunow Refrigeration Company, but had been laid off about a week previously because of slack business. That he earned an average of Forty (\$40.00) Dollars to Forty-five (\$45.00) Dollars per week; that his next work, about a year after his injury, was with the Kraft Cheese Company loading freight cars; that the weight on his foot was too great and he was given a job operating the freight elevator. He held this job for about a month and his salary averaged Eighteen (\$18.00) Dollars per week. He next became employed in December, 1934 by the Belke Manufacturing Company where he was still employed at the time he gave testimony herein. At present he is employed as a machinist on line work with wages of Twenty-two (\$22.00) Dollars per week. He is required to stand while doing this work and at times requires help in doing heavy lifting, because of the pain in his foot.

The Military & Naval Code of Illinois contains the following provision:

"In every case where an officer or enlisted man of the National Guard or Naval Reserve shall be injured, wounded or killed while performing his duty as an officer or enlisted man in pursuance of orders from the commander-in-chief, said officer or enlisted man or his heirs or dependents, shall have a claim against the State for financial help or assistance, and the State Court of Claims shall act on and adjust the same as the merits of each case may demand." *Sec. 143 (Ch. 129 Ill. Rev. Statutes).*

Claimant was injured February 8, 1933. As above stated, he was not then working but had been employed at Forty-five (\$45.00) Dollars per week in his last employment. His enlistment in the National Guard expired in June, 1933 and he then re-enlisted. He was discharged in May, 1934 and again re-enlisted in July, 1934 and attended camp in August of that year. When first employed after his accident in May, 1934 his average earnings were Eighteen (\$18.00) Dollars per week. His highest earnings since the accident have been Twenty-two (\$22.00) Dollars per week. The employment which he has done since his injury has apparently necessitated more heavy labor than that which he was doing before his injury, and the record does not support a finding that he is not able to earn as substantial wages now as prior to the accident, by reason of the results of such accident, and the record does not support a conclusion and an award of such permanent disability as would entitle claimant to an award for permanent disability.

The claimant was treated by doctors furnished by the Illinois National Guard and no claim is made for medical or hospital bills.

Claimant did however as a result of the accident lose a substantial amount of time because of his inability to work while convalescing. While the evidence indicates that he took some interest in the work of his Military Company before May 1, 1934, he was not able to engage in any remunerative employment until the latter date. If he had been injured while working as an employee for either the State or for a private industrial employer he would, under the provisions of the Workmen's Compensation Act of Illinois, have been entitled to fifty (50) per cent of his average weekly wage for the period of his temporary total incapacity at a rate not to exceed Fifteen (\$15.00) Dollars per week. This would

have extended from February 8, 1933 to May 1, 1934 and would have amounted to Nine Hundred Sixty-seven (\$967.00) Dollars. In the absence of a definite rule by which the court can be guided, it is difficult to determine how closely one should follow the awards made in industrial cases. In many cases of injuries suffered by men in the service of the National Guard, temporary financial aid is given by orders of the Commander-in-Chief. No such temporary aid is shown by the record to have been given in this case. From all the facts and circumstances we believe that an award of One Thousand (\$1,000.00) Dollars is within the proper exercise of discretion given to the court herein. An award of One Thousand (\$1,000.00) Dollars is hereby accordingly made in favor of claimant by reason of the accident in question.

(No. 3066—Claimant awarded \$850.00.)

LUDWIG REPPERT, Claimant, vs. STATE OF ILLINOIS, Respondent.
Opinion filed May 11, 1939.

PAUL D. PERONA and JOSEF T. SKINNER, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—construction of public improvement causing—measure of. Where private property is not taken for public use, but is damaged by reason of the construction of a public improvement, the proper measure of damages is the difference between the fair, cash market value of the property unaffected by the improvement and its fair cash, market value, as affected by it.

SAME—same interference with right of access—proper element—when award may be made. Where construction of public improvement permanently interferes with right of access of owner of private property thereto, said interference is a proper element of damages, and where same results in a depreciation of the fair cash, market value of the property, an award may be made.

MR. JUSTICE YANTIS delivered the opinion of the court :

Claimant seeks damages from the State in the sum of Five Thousand (\$5,000.00) Dollars, alleged to have been caused as indirect damage to property not taken and arising out of the construction of a viaduct by respondent on Spaulding Street in the City of Spring Valley, Illinois. The property in question is at the south edge of Spring Valley and

was bounded by Spaulding Street on the west, on the south by the Chicago, Rock Island & Pacific Railway Company's right-of-way, on the east by the Chicago & Northwestern Railway Company's right-of-way, and on the north by Illinois Street. The latter is in common use by the general public but is an unimproved street. There is an entrance-way to the Northwestern Railroad Station from it, and the Standard Oil Company uses it as an entrance to the Bulk Station which is located east of the Ruppert property. For twenty-five years Illinois Street was used as a means of ingress and egress to the Ruppert property and has been open to the general public during that time. There has been no material change as to such ingress to the Ruppert property from Illinois Street since the construction of the viaduct referred to.

Plaintiff bought the property described in the Petition in 1907. At that time there was a two-story grain elevator on it and a flour and feed shop and three big corn cribs. Also, it had a stub or spur connection with the Northwestern Railway and this railway spur still extends to the property. At the time claimant bought the property the elevator included a little office building and an engine house and was fully equipped to do business. It was not being operated as an elevator but for the storage and shipping out of grain on the Northwestern Railway.

Claimant testified that he bought the property both for the property itself and for the flour, grain and feed business that existed in connection therewith. He paid Six Thousand (\$6,000.00) Dollars for the business and the property on the 13th day of June, 1907, and on the 13th day of August, the buildings were destroyed by fire. Same were never rebuilt, but in 1909 or 1910 he contracted to sell the property to a wrench manufacturing company, which began the foundation for a building but soon after abandoned the project. In 1912 Spaulding Street was paved and plaintiff paid Six Hundred One (\$601.00) Dollars for the cost of the improvement in front of his property. About 1934 a new bridge was constructed across the Illinois River making an arterial highway of Spaulding Street through the City of Spring Valley. About a year after the bridge was completed a viaduct was built northward from the newly constructed bridge for the purpose of passing over the Rock Island main tracks. This viaduct runs above Spaulding Street and has a gradual grade

which starts forty or fifty feet north of claimant's property, i. e. such elevation starts somewhat north of Illinois Street and the elevation gradually rises until it passes claimant's property. Prior to the construction of the viaduct the paved street, known as Spaulding Street, ended at the Rock Island Railroad and at that time the Ruppert property was at an elevation of about six or seven feet above the road level. This variation in levels changed as one went to the north line of claimant's property, so that the north fifty or sixty feet of the Ruppert property was or could have been accessible from Spaulding Street.

Claimant contends that the remainder of his frontage on Spaulding Street was accessible thereto, and that such possible ingress and egress along the full length of Spaulding Street has been lost by virtue of the construction of said viaduct, and that his property as a result thereof has been damaged in excess of Five Thousand (\$5,000.00) Dollars. A number of witnesses have testified respectively for claimant and respondent, both as to the accessibility of the property and its possible use, and as to its value before and after the construction of the viaduct. It is not necessary to review in detail the testimony of each witness. Suffice it to say that from a consideration of all the evidence in the record, it becomes apparent to the court that the property in question, both before the construction of the new bridge over the Illinois River and the new viaduct, and since such construction was completed, is best adapted for storage and factory purposes, and that the possible use thereof for such purposes has not been materially changed by virtue of the construction of the viaduct. Further, that the accessibility of said property has only been affected to a limited degree for it appears that ingress can still be had to the north forty or fifty feet of said premises, from Spaulding Street, and that in order to have had such ingress to the balance of the property prior to the construction of the viaduct, it would have been necessary to have expended a substantial sum to have graded the property so as to permit entrance from said street. Plaintiff paid Six Thousand (\$6,000.00) Dollars for the premises as a piece of improved real estate, which at the time was a site of a good business enterprise. We can only estimate the value of the bare real estate, after the grain elevator was destroyed and the flour, feed and grain business

no longer existed, by the price at which plaintiff himself valued the premises at the time of his offer to sell the premises. This, he placed at Two Thousand (\$2,000.00) Dollars. The proof of value of said premises prior to the construction of the viaduct, as testified to by some of his witnesses, were frankly the expressions of his own view as suggested to the witnesses, and according to their statements were governed in part by the prospective increase in travel which would be brought past these premises by an improved through highway on the level of Spaulding Street, instead of over a viaduct at a higher elevation along and above such street. This does not form a proper basis upon which to prove the value of the premises before the construction of the improvement in question.

From a consideration of all the evidence in the record, and from a personal inspection of the premises by the court, we conclude that the property has been damaged because of loss of frontage approach, and the interference with ingress to the property from Spaulding Street in the sum of Eight Hundred Fifty (\$850.00) Dollars. An award of Eight Hundred Fifty (\$850.00) Dollars is hereby made in favor of the claimant.

(No. 3030—Claimant awarded \$4,000.00.)

EVELYN McINTOSH, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 22, 1939.

HARRIS B. GAINES, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MURSE, Assistant Attorney General, for respondent.

ILLINOIS NATIONAL GUARD—*member of—disease contracted by while in performance of duties as—resulting in impairment or aggravation of other organs or physical functions causing death—when direct causal relation is shown between disease and death—when award for death may be made under provisions of Military and Naval Code.* Where it appears that member of Illinois National Guard contracted disease, to which he was exposed to a greater degree than the general public, while in the performance of his duties as such member, resulting in the impairment or aggravation of other of his organs, or physical functions, necessitating a surgical operation, which he failed to survive, there is a direct causal relation between such disease and his death and an award for compensation may be made to his dependents, under the provisions of the Military and Naval Code.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The complaint in this case alleges that the claimant was the wife of Theodore McIntosh, deceased; that on, and for a long time prior to August 7, 1936, Theodore McIntosh was an enlisted member of the 8th Regiment of the Illinois National Guard, serving with the rank of sergeant; that on the day last mentioned, he, with other members of his regiment, was ordered by his superior officers to engage in Field Training maneuvers with the Howitzer Co. 8th Infantry Illinois National Guard in the State of Michigan; that he served from then, until August 22nd of the same year.

The complaint alleges, as supported by the proof, that on and prior to August 7, 1936, the deceased was in good, sound physical condition; that between August 7, 1936 and August 22, 1936, while serving with the said company, the deceased became ill with physical disorders of his abdomen as the result of his military services, and while performing activities requiring severe exertion, and strain, to-wit: heavy marching and handling heavy field equipment; that upon his return to his home on August 22, 1936, he was still suffering from said illness; that as the result of said illness or said injury, he was confined to his bed immediately upon his return to his home, and became progressively worse until August 24, 1936 when he attempted to report his illness to military authorities; that because of an alleged disruption of telephonic communication, claimant did not succeed in reporting the illness or injury to the military authorities until August 26, 1936, and on that day deceased was removed from his home to the military hospital at Fort Sheridan, Illinois, and as a direct result of said illness said deceased died on August 30, 1936 at the military hospital at Fort Sheridan, Illinois.

The widow claims compensation for the death of Theodore McIntosh "which said death occurred while deceased was engaged in line of duty with said military forces of the State of Illinois." No specific amount is claimed.

It will be noted that the complaint does not make any specific averments as to the kind of illness or the cause thereof. From the evidence of the widow, it appears that the deceased had had no previous illness and had always been in good health; that during the time that the deceased was

engaged in Field Training maneuvers, other soldiers in the same company and regiment were stricken with dysentery, which caused disablement for varying periods of time; that during the time that the deceased was in encampment, on to wit: August 18, 1936, he was stricken with what his comrades thought was dysentery; that his illness continued during the remainder of the encampment and upon returning to his home the deceased took to his bed, growing gradually worse until he was sent to Fort Sheridan Military Hospital on August 26, 1936, where he died from acute gangrenous appendicitis and peritonitis.

Our attention is called to Section 142 of Chapter 129 Illinois Revised Statutes 1937, the same being the Military and Naval Code of the State of Illinois, which provides as follows:

"Any officer or enlisted man of the National Guard or Naval Reserve who may be wounded or disabled in any way, while on duty and lawfully performing the same, so as to prevent his working at his profession, trade or other occupation from which he gains his living, shall be entitled to be treated by an officer of the medical department detailed by the surgeon general, and to draw one-half his active service pay, as specified in Sections 3 and 4 of this article, for not to exceed thirty days of such disability, on the certificate of the attending medical officer; if still disabled at the end of thirty days, he shall be entitled to draw pay at the same rate for such period as a board of three medical officers, duly convened by order of the Commander-in-Chief, may determine to be right and just, but not to exceed six months, unless approved by the State Court of Claims."

Claimant makes the argument that there seems to be no question but that the deceased died from an illness or injury occasioned or received in line of his official duty as a member of the National Guard of the State of Illinois; that the evidence is uncontradicted throughout the whole record on that score; that a military board was convened by the military authorities to inquire into the cause surrounding the death of the deceased, and the finding of this board was "that the deceased, Sergeant Theodore McIntosh, was afflicted with an illness, incurred in line of duty."

The deposition of Claudius L. Forney was taken on behalf of the claimant. He testified that he lives at 363 E. 51st Street, Chicago, Illinois; that in 1927, he was licensed to practice medicine in the State of Illinois, and has been a practicing physician in the State of Illinois since that time; that he spent two years as an interne in the County Hospital in

Chicago before receiving his license; that he is a graduate of the Ohio State University and a Post Graduate of the University of Chicago; that he had been a member of the staff, department of surgery, of the Provident Hospital, and was a member of the staff of the Cook County Bureau of Public Welfare Physicians, and that he was a medical officer of the Eighth Regiment, Illinois National Guard. He further testified that as a medical officer for the second battalion, he treated the deceased during the encampment in Michigan; that the deceased was a young man, in his late twenties. (His age was twenty-nine years his last birthday, and the record shows that the deceased weighed about 180 pounds.)

Dr. Forney further testified that during the encampment in Michigan in 1936, there was a general epidemic of gastrointestinal upset, which they called dysentery, but they were never able to locate the germ to make a proper diagnosis, except a general epidemic of dysentery. This disease had been prevalent in the locality where the camp was located, before they went to camp, and its probable source was through the water. Almost every member of the National Guard was afflicted to some degree, and the hospital was overcrowded. The doctor testified that the deceased being assigned to the second battalion, came under Dr. Forney's care and he, the doctor, had diagnosed the case as dysentery, along with the rest of the intestinal upset. He could not recall how many times he had seen him, but this doctor gave as his opinion, based upon a reasonable degree of medical certainty, that the deceased who had been encamped at Pearl, Michigan, for several days in outdoor tents, during an epidemic of dysentery, had dysentery; that after a few days encampment at Pearl, this organization broke camp and proceeded, partly by forced marches, on foot and by trucks, stopping for over night bivouac en route, to Camp Custer, Michigan, that the activities of this organization included living in outdoor tents, having strenuous field exercises, in addition to the usual routine of soldiers.

A hypothetical question based upon these facts was put to Dr. Forney: Assuming doctor, that on the 18th day of August, 1936, during the said field training at Camp Custer, Michigan, the deceased, (who is referred to as a hypothetical man) became ill and complained of stomach disorder; that he was examined by a medical officer of the organization who

found him to be suffering from gastro-intestinal disorder to the extent that the soldier was unable to perform his assigned duties; that on the 21st day of August, 1936, camp was broken at Camp Custer, Michigan, and they proceeded to their homes in Chicago, by train and boat, with short foot marches incident to reaching the said transportation facilities, and in reaching the armory of this organization after the arrival of the boat in Chicago; that en route from Camp Custer, Michigan to Chicago, Illinois, the deceased, still complained of his illness and was not able to carry his pack and individual equipment as was required by other members of the organization. The hypothetical question further assumed that upon arrival of the soldiers at 3517 Giles Avenue, Chicago, Illinois, on August 22, 1936, deceased was still complaining of pains in the region of the abdomen; that shortly after the arrival at the armory, he went to his home, where he went immediately to bed and remained in bed at his home from August 22 to August 25th of that year, during which time the deceased refused to eat food prepared for him and complained of violent pains in his abdomen and side. On August 26, 1936, this soldier was transferred by ambulance from Chicago to the station hospital at Fort Sheridan, where his case was diagnosed as appendicitis, acute, gangrenous peritonitis, acute, generalized, caused by appendicitis. On the same day, an appendectomy operation through the right rectus incision with one rubber drain inserted was performed under procain anesthesia. The deceased died at 1:30 in the morning on August 30, 1936, at the station hospital at Fort Sheridan, Illinois.

With these facts in mind, Dr. Forney based his opinion upon his knowledge and experience as a physician and surgeon, and stated that it was his opinion based upon a reasonable degree of medical certainty that there was a direct causal connection between the illness with which the deceased was afflicted at Camp Custer, Michigan, on or about August 18, 1936, and subsequently thereto, and the condition of ill being found when he was admitted to the hospital at Fort Sheridan. He also stated that inasmuch as the appendix is part of the gastro-intestinal tract, any illness so intensive as a dysentery would involve the whole gastro-intestinal tract, and in his opinion the appendix would be involved, especially where one was living under the conditions that this soldier

lived, and that these conditions were conducive to continuing the irritation of the appendix and the rest of the gastro-intestinal tract; that in civilian life, a person suffering from a gastro-intestinal disorder would be put in bed, and put on liquid diets and kept quiet. This man was subjected to camp duties, such as marching and if he took food he had to take the coarse food that is provided at camp. The coarse food and living conditions were responsible for the result of the appendicitis. At Fort Sheridan, the deceased, was found to be suffering from gangrenous appendicitis and peritonitis. The gangrenous condition followed the appendix condition and peritonitis did not set in until the appendix became gangrenous and ruptured. During this period of time all the soldiers in the National Guard were on routine army rations, and no provisions were made for preparing special diets for sick soldiers. It was very dusty there, and the food was frequently full of dust and grit, and after those long marches they had to eat dust, grit and all, which was also a possible source of infection and irritation to the gastro-intestinal tract. A well person might get along fairly well, but one who was suffering from intestinal trouble should have had a more careful diet. The doctor gives as his opinion that the food conditions aggravated the conditions of the deceased.

Under the evidence in this case, we are of the opinion that there is a direct causal connection between the illness of the deceased suffered at Camp Custer, Michigan, and the conditions found by the operating surgeons at Fort Sheridan.

Deceased had been employed at a CCC camp at Palatine, Illinois for about eighteen (18) months prior to the time of his death and received a compensation of Forty-five Dollars (\$45.00) per month, together with his board. Before that, he was an automobile mechanic and earned Forty-five Dollars (\$45.00) per week, and the record shows he supported a wife and that they had no children.

In view of all the facts and circumstances, we are of the opinion that the dysentery suffered by the deceased was contracted at camp and the medical testimony is to the effect that the appendix was aggravated and that there is a causal connection between the ailment that he suffered and his death, and the public at large was not exposed to this ailment as he was.

We, therefore, make an award in favor of Evelyn McIntosh, wife of the deceased, in the sum of Four Thousand Dollars (\$4,000.00) and recommend that the legislature make an appropriation for this amount.

(No. 3223—Claim denied.)

VILLAGE OF DEERFIELD, A MUNICIPAL CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 22, 1939.

GEORGE S. MCGAUGHEY, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

PUBLIC UTILITY TAX—when payment of deemed voluntary, despite protest accompanying—remedy in court of general jurisdiction—failure to pursue bars award. The question involved herein was before this court in the case of *City of Oglesby vs. State*, No. 3097, ante and the opinion in that case is controlling in the present instance.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

The Village of Deerfield, a municipal corporation, seeks an award in the amount of Eight Hundred Thirty-two Dollars and Eighty-three Cents (\$832.83), being the amount paid by it to the respondent as a tax on gross sales of water made by claimant during the period from September 10th, 1935 to February 6th, 1937, inclusive, pursuant to the provisions of an Act entitled "An Act in Relation to a Tax Upon Persons Engaged in the Business of Transmitting Telegraph or Telephone Messages, or of Distribution, Supplying, Furnishing or Selling Water, Gas or Electricity," approved June 27th, 1935, commonly known as The Public Utility Tax Act (Smith-Hurd Ill. Rev. Stat. 1935, Chap. 120, sec. 440 et seq.).

Such Act was declared unconstitutional by the Supreme Court of this State in the case of *City of Chicago vs. Ames*, 365 Ill. 529, and claimant contends that the payments made by it as aforesaid were made under a mistake of law, and under the provisions of Section 445 of the aforementioned Public Utility Tax Act, should be refunded.

The Attorney General has moved to dismiss the claim, and the case now comes before the court on such motion.

The identical question here involved was before this court in the case of *City of Oglesby vs. State*, No. 3097, decided at the November Term, 1938, in which case we held that the claimant was not entitled to a refund of the payments made by it.

The facts in that case were similar to the facts here involved; the case was fully considered by the court, and the rule there laid down governs us in the decision of this case.

For the reasons set forth in the case of *City of Oglesby vs. State*, *ante*, the motion of the Attorney General must be sustained and the case dismissed.

(No. 2598—Claimant awarded \$5,500.00.)

LAWRENCE F. RAU, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 22, 1939.

MARKMAN, DONOVAN & SULLIVAN, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*to property not taken for public use—caused by construction of public improvement—measure of.* Where private property is not taken for public use, but is damaged by reason of the construction of a public improvement, the proper measure of damages is the difference between the fair, cash market value of the property, unaffected by the improvement and its fair cash value, as affected by it.

SAME—same—same—interference with access to property, proper element of. A change in the grade of a street, in the construction of a public improvement, which results in interference with access to private property, is damage to property, not taken for public use, within the meaning of the Constitution and compensation may be had therefor.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant is the owner of a tract of land situated on the east side of Halsted Street, between 136th Street (also known as Riverdale Road) and 138th Street, containing approximately 16.44 acres.

Such tract lies about six blocks south of the Little Calumet River which, at that point, is the southern boundary line of the City of Chicago, is immediately south of the right-of-way of the B. & O. Chicago Terminal Railway (hereinafter

referred to as the "Railway"); is within the corporate limits of the Village of Riverdale, is about one mile from the City of Blue Island, two miles from the City of Harvey, and three-quarters of a mile from the L. C. Suburban Station. It has a frontage of approximately 1,300 feet on Halsted Street, and at the time of the making of the improvement hereinafter referred to, there was a gasoline filling station, an onion house, a garage, a barn, and some chicken houses thereon, all located near the northwest corner thereof.

Halsted Street as originally laid out ran due north and south past the claimant's property. 138th Street runs east and west on the Township line. At the intersection of Halsted Street with 138th Street, there was originally a jog to the west of about Two Hundred feet.

During the year 1927 the Highway Department of the respondent, in order to eliminate the right-angle turn at the intersection of 138th and Halsted Streets, re-routed certain portions of Halsted Street as it then existed, so that in going from north to south at a point about twelve feet north of the center line of 136th Street, the roadway curved to the west and proceeded in a southwesterly direction and joined the original Halsted Street again at 148th Street, at a point about 200 feet west of the original intersection. The new roadway was constructed at grade, and as a result of the change thus made, Halsted Street between 136th and 138th Streets had two branches, to wit, the original highway, which extended directly south to 138th Street, and the new curved highway which curved to the southwest and intersected 138th Street about 200 feet west of the first mentioned branch. Both branches joined at a point south of the Railway right-of-way, and crossed the railway tracks at grade.

Halsted Street, which is also known as Illinois Route No. 1, is one of the main north and south arterial highways in Cook County. It begins at Lake Michigan, about six miles north of Madison Street in the City of Chicago, and extends due south the entire length of the City, then proceeds through Riverdale, Harvey, Chicago Heights and Steger, to the County line.

During the year 1934 a viaduct was constructed over the Railway, and in 1935 the approaches thereto were completed, and the course of Halsted Street was again slightly modified.

The new roadway was slightly to the west of that branch of Halsted Street which was constructed in 1927.

After the construction of the viaduct the grade crossing of Halsted Street was closed and a barrier built across Halsted Street just south of the right-of-way line of the Railway.

The property on both sides of Halsted Street for practically its entire length through Chicago and the suburbs has been subdivided, with the exception of a small tract around 107th Street, another small tract near 111th Street, and the property immediately between the Rau property and the city limits of the City of Chicago.

The elevation of the viaduct at the center of 136th Street is 17½ feet above the level of the previous roadway, and the approach to such viaduct descends gradually in a southerly direction to a point 550 feet south of the center of 136th Street, at which point the elevation is substantially the same as it was prior to the construction of the improvement.

Claimant maintains that his property has been damaged for public use, without just compensation, and that under the provisions of Section 13 of Article II of the Constitution, he is entitled to compensation therefor in the amount of \$50,000.00, and alleges in his brief that his claim for damages is based on the following items, to wit:

1. "The elevation of the roadway of Halsted Street in front of his property."
2. "The closing of the arterial public highway to which his property had immediate access and which added greatly to the value of his property."

Section 13 of Article II of the Constitution of 1870 provides that private property shall not be taken or damaged for public use without just compensation. The Constitution of 1848 provided that private property should not be taken for public use without just compensation, but made no provision for compensation in cases where private property was damaged but not taken. This resulted in hardship in numerous cases, and in order to remedy the situation, provision was made in the Constitution of 1870 requiring compensation to be paid for private property which was damaged but not taken for public use.

The legal questions involved in cases of this kind have been before our courts in numerous cases, and the underlying principles have been definitely established and determined. The following rules have often been announced and applied:

1. In considering what additional classes of cases the framers of the present Constitution intended to provide for, the rule is, that it was not the intention to reach every possible injury that might be occasioned by a public improvement; that to warrant a recovery it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property and which gives to it an additional value, and by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally.

Otis Elevator Co. vs. City of Chicago, 263 Ill. 419-424.

City of Winchester vs. Ring, 312 Ill. 544-552.

Illinois Power & Light Corporation vs. Talbott, 321 Ill. 538.

Schuler vs. Wilson, 322 Ill. 503.

2. The construction of a viaduct or embankment in a street, or a change of grade thereof, which obstructs or injuriously affects access to or egress from adjoining property, whereby the same is damaged, gives the owner a right to recover for the damages so sustained.

Rigney vs. City of Chicago, 162 Ill. 64.

Chicago vs. Jackson, 196 Ill. 496.

Chapman vs. City of Staunton, 246 Ill. 394.

Barnard vs. Chicago, 270 Ill. 27.

3. Any damage resulting to an abutting owner on account of the increase or diversion of traffic from the vicinity of his property is not such damage as entitles the owner to compensation therefor.

Hohmann vs. City of Chicago, 140 Ill. 226-230.

City of Chicago vs. Spoor, 190 Ill. 340-348.

City of Chicago vs. McShane, 102 Ill. App. 239-243.

Cunco vs. City of Chicago, 292 Ill. App. 235-240.

4. Depreciation in market value will not sustain a claim for damages to land not taken unless such depreciation results from a cause which the law regards as a basis for damages.

Illinois Power & Light Corporation vs. Talbott, 321 Ill. 538.

Rockford Electric Co. vs. Browman, 339 Ill. 212.

5. The proper measure of damages in cases where property is damaged but not taken for public use, is the difference between the fair cash market value of the property unaffected by the improvement and the fair cash market value thereof as affected by it.

Brand vs. Union Elevator Co., 258 Ill. 133.

Dept. of Public Works vs. Caldwell, 301 Ill. 242.

Dept. of Public Works vs. McBride, 338 Ill. 347.

The difficulty in cases of this kind is not so much in determining the controlling principles of law, as in determining the facts in the case and applying the proper principles of law thereto.

Since 1930 claimant's land has been used for the purpose of raising onion sets, and prior to that time for the raising of asparagus.

Claimant called three real estate experts as witnesses, each of whom testified that the highest and best use to which the premises was adaptable at the time of the construction of the viaduct in question, was for subdivision purposes. Respondent called two real estate experts who testified that the highest and best use to which the premises was then adaptable was for industrial purposes. The experts on both sides testified as to the fair cash market value of the property prior to the making of the improvement and unaffected thereby, and its fair cash market value subsequent to the making of the improvement and as affected thereby.

The three expert witnesses for the claimant testified that in their opinion the property of the claimant was depreciated in value in the following respective sums, to wit: \$33,850.00; \$32,000.00; and \$32,800.00. The claimant himself fixed the amount of such depreciation at \$3,500.00 per acre.

One of the witnesses for the respondent fixed the amount of such depreciation at \$3,000.00, and the other stated that in his opinion the property was worth as much after the making of the improvement as it was before.

In considering the opinions of the witnesses for the claimant as above set forth, the following facts must be borne in mind:

1. That there is a large amount of vacant property between claimant's property and the south corporate limits of the City of Chicago;—one of the witnesses for respondent having testified that "from 87th Street south to 130th Street, with the exception of some business stores in Pullman, it is approximately 95% vacant."

2. Such opinions were based in part upon the assumption, as testified by them, that as the result of the re-location of Halsted Street in 1927, the curve to the west commenced at a point approximately 500 feet south of the north line of claimant's property, whereas it appears from the plat in evidence and the testimony of the State Highway Engineer that the curve from the original Halsted Street commenced at a point twelve feet north of the center line of 136th Street.

3. Such opinions were based in part upon the assumption, as testified by them, that the elevation of the approach to the viaduct came down to grade approximately at or just north of 138th Street, whereas it appears from the plat in evidence and the testimony of the State Highway Engineer that at a point 550 feet south of the center line of 136th Street

the elevation was but two or three inches higher than the original pavement.

4. Such opinions were based in part upon the assumption, as testified by them, that the highest part of the elevation opposite claimant's property was about twenty-five feet above the old grade, whereas it appears from the plat in evidence and the testimony of the aforementioned Highway Engineer that the highest point of the elevation was seventeen and one-half feet above the old grade.

5. Any depreciation in the value of claimant's property, resulting from the re-location of 1927, cannot be considered in this proceeding as any claim therefor was barred prior to the filing of the complaint herein.

6. In considering the value of claimant's property for subdivision purposes both before and after the construction of the viaduct, claimant's witnesses considered the 16.44-acre tract as a whole. They stated, however, that they made no deduction for loss of valuation except for the Halsted Street frontage, but apparently they based their estimates on a frontage of approximately 1,300 feet, whereas the elevation of the highway as shown by the plat in evidence and the testimony of the State Highway Engineer, was limited to approximately the north 550 feet of such frontage.

The principal difference in the estimates of the several witnesses arises from the fact that the witnesses for claimant considered the property as subdivision property with business frontage on old Halsted Street, and valued it as such, while the witnesses for respondent considered the property as industrial property, and based their valuation upon such assumption.

We have carefully considered all of the evidence in the record, have made a personal inspection of the property in question, and are of the opinion that access to the property of the claimant has been obstructed and injuriously affected as the result of the construction of the viaduct in question; and that the property of the claimant has been depreciated in value as the result thereof; that the damages to the claimant's property as the result of elements properly considered in determining such damages, in accordance with the aforementioned principles of law, is the sum of Fifty-five Hundred Dollars (\$5,500.00).

Award is therefore entered in favor of the claimant for the sum of Fifty-five Hundred Dollars (\$5,500.00).

(No. 2534—Claimant awarded \$62,032.18.)

SCHEFF AND BARNES, A CORPORATION, Claimant, vs. STATE OF
ILLINOIS, Respondent.

Opinion filed May 9, 1939.
Rehearing denied May 22, 1939.

BROWN, HAY & STEPHENS, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR,
Assistant Attorney General, for respondent.

PRINTING—Statutory classification of kinds of—provisions of, requiring advertising for bids and awarding separate contract for each class, mandatory. Under the provisions of paragraphs 10, 14, 15 and 18 of chapter 127, Cahill's Illinois Revised Statutes, 1931, it is obligatory upon the Superintendent of Printing to advertise for bids for the various types of printing work required by the State and to thereafter let separate contracts for each class, and a claimant, having a contract with State to do printing of the 6th class cannot recover for printing of other classes, named in statute, where work is done by it, on orders placed without lawful authority, without any advertising for bids and without any contract having been awarded to it for such work, in manner required by law, as said provisions are mandatory, and any contract made in violation thereof is void.

SAME—furnished under contract prohibited by law—no implied promise to pay for. There can be no recovery of amount fixed in express contract for printing, furnished State thereunder, where the said contract is prohibited by law, on the theory of an implied promise to pay amount, as no contract will be implied, where such express contract is forbidden.

SAME—contracts for, prohibited by law—acceptance of benefits by State under not ratification of—cannot be ratified. Where claimant furnished printing to State, which is accepted by it, under contract prohibited by law, such acceptance by agents of the State, is not a ratification of such contract, so as to make State liable thereunder, as there can be no ratification of a contract prohibited by law and to hold otherwise would foster favoritism, corruption and extravagance in the awarding of public contracts and render the State liable under contracts illegally and irregularly entered into by its officers and agents.

SAME—lapse of appropriation out of which could be paid—when award may be made for. Where it appears that State received printing, as ordered by it, under contract, in accordance with law, and that bill therefor, was not presented before lapse of appropriation, out of which it could be paid, an award may be made, on claim filed within a reasonable time.

MR. JUSTICE YASTIS delivered the opinion of the court:

Claimant herein is a printing company incorporated under the laws of the State of Illinois, and has been engaged for a number of years in the business of printing and binding in the City of Springfield. During its operation it has from

the term beginning with the 1st day of January, 1932 and ending with the 30th day of June, 1933." * * *

"The party of the second part agrees to pay to the party of the first part therefor in the manner provided by law, at the rates and prices set forth and mentioned in the proposal hereto attached."

In the claim now under consideration claimant seeks an award in the sum of \$85,091.64, claiming payment due for unpaid work alleged to have been performed under the terms of and pursuant to said contract in the amount of \$66,521.19 and interest thereon at five (5) per cent from September 30, 1933 to April 30, 1939, because of alleged unnecessary and vexatious delay in payment, to the amount of \$18,570.45. Incidentally involved is a supplemental agreement entered into between claimant and E. B. Dunigan, then Superintendent of the Division of Printing, in March, 1933, whereby claimant agreed to make the price per volume set of automobile lists, \$1,227.50, instead of such charge being computed on the itemized figures quoted in the original specifications and proposal, which the record shows resulted in a cost of \$1,700.00 per volume set.

The first orders apparently issued by respondent to the claimant for printing work after the making of the contract of November 25, 1931 was on November 14, 1932. Successive orders for printing of opinions and orders of various boards, miscellaneous blanks and pamphlets, bulletins, circulars, notices and automobile license list books, followed through November and December, 1932, and January, February, March, May and June of 1933.

All of the printing and binding was furnished pursuant to orders issued by whoever was the active Superintendent of the Division of Printing of the Department of Purchases and Construction of the State of Illinois at the respective times, and according to the record such printing and binding was done by claimant and the supplies in question were delivered by it to the various agencies of respondent as indicated in the orders. Bills were submitted prior to September 30, 1933 but payment has in fact not been made.

Notwithstanding the non-payment of previous bills, Schnepf & Barnes continued to print the volumes of motor lists after June 30, 1933, and received ten orders for same. Eight of these aggregated the sum of \$12,001.37. The State also refused to pay for these items and a mandamus proceed-

ing was brought in the Circuit Court of Sangamon County on July 19, 1934 to compel payment of the latter sum. After a contested hearing the Circuit Court awarded the Writ of Mandamus and on October 2, 1935 the said sum of \$12,001.37 was paid.

After the foregoing mandamus proceedings were brought, claimant company printed two further sets of volumes of motor lists at a price of \$3,726.20 and that bill was paid by the State of Illinois on September 13, 1934.

The complaint in the present suit was filed in the Court of Claims on November 1, 1934. Its purpose is to recover the amounts alleged to be due and unpaid up to June 30, 1933. The claim covers one hundred twelve (112) different items aggregating \$71,369.77, of which forty-five (45) are for printing the motor list books, in an aggregate of \$45,237.50. The balance of the claim covers miscellaneous items as above suggested.

Thirty of the one hundred twelve (112) items involved, aggregate \$20,278.99 and were ordered by H. L. Williamson, then Superintendent of the Division of Printing. It appears that all of such items were delivered after the change of administration in *January*, 1933. Eight (8) of the remaining items were ordered by T. E. Bland, Assistant Superintendent, subsequent to January 18, 1933 and aggregated \$2,007.85. Fifty-three (53) items were orders issued by E. B. Dunigan, then Superintendent of Printing, and aggregated \$25,995.12, and twenty-one (21) items were ordered by E. T. Rank, Superintendent of Printing and aggregated \$23,087.81.

Under the existing practice, stock paper was furnished by the State to the printer for certain types of work, and in recasting the credits in connection therewith, the claimant has conceded an allowance to be due respondent upon claimant's bill by reason of such paper credit, in the sum of \$4,848.58, leaving the net balance of plaintiff's claim \$66,521.19, plus its additional claim for interest figured to April 30, 1939 of \$18,570.45. A number of contentions are made by the Attorney General in opposition to the allowance of any award herein. The first of such objections is that the complaint herein is not verified as provided by rule of court. Examination of the complaint discloses that such complaint is supported by proper bill of particulars and sworn verification, signed October 31, 1934 prior to the filing of the complaint. It is next

contended that many items appearing in the bill of particulars do not come within the proper designation of sixth class printing as described by statutes of Illinois then and there in force.

A recapitulation of such classification is as follows:

Second and Third Class:

- "(a) The printing of the journals, including the daily journals of the Senate and House of Representatives and
- "(b) Other printing for the General Assembly such as synopsis of bills, reports of Committees, and communications not comprehended within the first class;
- "(c) Also the printing of the Session Laws and Reports of all officers, boards, commissions, institutions and departments, which are bound in cloth or leather, or partly in cloth or leather and partly in paper; shall constitute second and third class.

Sixth Class:

- "(a) All pamphlet work including circulars, synopsis and other similar work and
- "(b) All reports and documents which are not bound wholly or in part in cloth, leather or other hard binding, including binding thereof, and not comprehended in any other class, shall constitute sixth class.

Seventh Class:

- "(a) All job printing and
- "(b) All printing not otherwise classified including binding thereof, if ordered by the Superintendent of Printing, shall constitute seventh class."

"1931 Cah. Ill. Rev. Stat. Chap. 127, Par. 14."

The evidence herein discloses that the classification of types of printing was made in the Division of Printing at the time it sent out its respective orders.

John J. Donoghue testified that he is Acting Superintendent of Printing for respondent and has been connected with the printing department since March 17, 1933; that he is familiar with the various classes of printing and of the contracts made by his department during the time in question herein; further, that during the year 1932 the claimant did not have the contract for classes two and three, class seven or for the contract for binding; that the records in his office show that the Journal Printing Company had the contract for second and third class work, the Illinois Printing Company had the seventh class work and the Jefferson Company had the contract for binding. Mr. Donoghue testified that under the practice in the department, the classification of

work, i. e. the determination as to the printer to whom various orders should be sent, was made by Mr. Dunigan, Mr. Rank, and himself, during their respective administrations. He further testified that when an order is issued for printing, his department makes an examination to see whether or not sufficient funds remain in the appropriation for that particular expenditure to cover the printing involved in that order. The witness stated that he did not know whether that practice was followed prior to the time he became associated in the office in 1933. Upon examining the various exhibits or order blanks, upon which the several items constituting the present claim rest, Mr. Donoghue identified a considerable number as not being sixth class work but of such character as would be classified under second, third or seventh class. If all of these items should be excepted from favorable consideration herein, as counsel for respondent contends they should be, a deduction from the claim of \$6,313.22 would result.

Nothing appears upon some of these exhibits by which one can be definitely informed as to what class the order should be placed in, other than the description itself of the work required thereunder. There are a number of these orders however which bear upon their face in bold type the identification of such matter as being in second, third or seventh class, or in several instances requiring cloth or leather binding which would definitely fix same as printing of the second and third class.

Under the provisions of Illinois law (Paragraphs 10, 14, 15 and 18, Chapter 127, Cahill's Ill. Revised Statutes, 1931), it was obligatory upon the Superintendent of Printing to advertise for bids for the various types of printing work required by the State and to thereafter let separate contracts for each class. Claimant had a contract for sixth class printing. It did not have a contract for any other class, as appears in the record. No authority existed for placing orders with claimant for any printing work except that for which a contract had been awarded to it. The orders for such work other than that of the sixth class could just have validly been given to some outside printer who had never made a bid and who had never received any contract.

The claimant herein was accustomed to doing public printing for the State, and, we cannot but assume, was fami-

liar with the type of work included in its bid of sixth class matter. It was directly advised by the class notations on certain of the orders that the latter were not items for which it held a contract. These specifically are:

| Exhibit | Amount |
|---|------------|
| A-4 | \$3,469.91 |
| A-10 | 497.28 |
| A-11—(apparent additional cost of binding)..... | 200.00 |
| A-20 | 6.20 |
| A-29 | 67.66 |
| A-37 | 14.46 |
| A-38 | 28.08 |
| A-43 | 31.50 |
| A-46 | 13.23 |
| A-47 | 8.58 |
| A-48 | 7.45 |
| A-49 | 43.13 |
| A-50 | 21.93 |
| A-52 | 6.00 |
| A-55 | 6.20 |
| A-57 | 42.74 |
| A-58 | 5.60 |
| A-67 | 9.53 |
| A-68 | 9.53 |

The total of the foregoing is..... \$4,489.01

Counsel for claimant contend that where a governmental authority has the power to make a contract, although its officials may not strictly comply with each statutory requirement in the execution and performance of the same, yet where the State receives the thing of value and appropriates it to its use, it must be regarded as having ratified the contract and should be required to pay therefor, on the theory that the government cannot enjoy the fruits of the contract and at the same time refuse to pay therefor. In support of this contention claimant cites, *People ex rel Chatterton vs. Secretary of State*, 58 Ill. 90; *McGovern vs. City of Chicago*, 281 Ill. 264; *City of East St. Louis vs. East St. Louis Gas Co.*, 98 Ill. 415; and *Smyth Co. vs. Chicago*, 294 Ill. 136.

Acceptance of the above rule would result in nullifying every requirement for public letting of State contracts, as a prompt performance of work could be done under such practice, and the State would then be obligated to pay for what

its departmental official had irregularly and illegally obligated it to do.

The object of the statutory provision is to prevent favoritism, corruption and extravagance in the awarding of public contracts, and we consider it the duty of the court to so administer and construe the law as to fairly and reasonably accomplish such purpose, and not to encourage a disregard of such restrictions.

For this court to give validity to bills thus incurred would be to circumvent the spirit, wording and purpose of the legislative act which requires that solicitation of bids shall be required in allotting the printing contracts of the State.

In *Chatterton vs. Secretary of State, supra*, the court found that the contract in question had not been obtained by fraud and collusion as alleged in the petition for mandamus; that the secretary had advertised for bids as required by statute and that the merchandise was equal in quality to the sample furnished with proposal for bid, and that the contract was in accordance with its terms. The court there said:

"Petitioner having furnished a thousand reams of the paper *under the contract, in conformity to its terms*, and there being no fraud, he is entitled to receive pay for that quantity."

After thus upholding the contract as having been validly made, the court glided to the opposite conclusion, in recognizing the right of the legislature to rescind the contract as to the balance of the contract for furnishing the remaining one thousand (1,000) reams of paper. In concluding its views the court said:

"It (the contract) was, perhaps, not absolutely void, as it was not made with a fraudulent intent."

We cannot accept this decision as justifying an award for the items of printing for which no contract was held by plaintiff.

In this and in other cases cited by claimant, the parties seeking payment for goods or services, did so under contracts held by them, but which, it was contended, had been improperly made. In the instant case claimant had no contract for printing second, third or seventh class matter or for binding books in leather or card-board, and the statutes expressly require that all printing must be done under contract and upon bids submitted.

The question of allowing recovery on the ground that the State is estopped to deny liability when it has accepted the benefit of the work, was considered at some length in the case of *Green & Sons Co. vs. State*, 9 C. C. R. 218, and we quote therefrom:

"Much confusion has arisen in decided cases on account of the failure to distinguish between two general classes of cases, to-wit: 1) Those involving contracts which although irregular, are within the authority of the political subdivision to make and do not violate any mandatory provisions of law, and 2) Those involving contracts which are either in excess of certain limited powers of such political subdivision, or are against public policy or are in violation of mandatory provisions of law.

"The legal effect of a contract made in violation of mandatory provisions of law, is set forth in an annotation appearing in 84 A. L. R., page 954, as follows:

'By the weight of authority, where by statute, charter, or constitutional provision, the power of a municipality, or other political subdivision, to make a contract, is limited, particularly where it is limited to a certain mode or manner of contracting, and any other manner of entering into a contract, or obligation is expressly or impliedly forbidden, no implied liability arises against a municipality for benefits received under a contract entered into in violation of those mandatory provisions, for no liability can result as a matter of implication where the express provisions of the statute or constitution negative its existence.'

"The legal effect of a requirement that public notice of the letting be given, and that the contract be let to the lowest bidder is set forth in 19 R. C. L. p. 1068, Section 356, as follows:

'A statutory provision that all contracts of a municipal corporation above a certain amount shall be advertised in a designated manner and awarded to the lowest bidder is mandatory, and a contract of the designated amount cannot lawfully be made by a municipal corporation in any other way. If the municipal authorities disregard the statute and fail to publish the advertisement as required by law, or award the contract to other than the lowest bidder, a taxpayer of the municipality may have their action enjoined, and the contract although duly executed and signed, cannot be enforced by the other party thereto. Nor can recovery be had on a *quantum meruit*.'

"The question under consideration has arisen in practically every State in the Union, and the decisions of the different States, and in many cases the decisions of the different courts of the same state are not entirely in harmony. The authorities on the question are reviewed in an exhaustive annotation to the case of *Johnson County Savings Bank, et al. vs. City of Creston*, 212 Iowa 420 reported in 84 A. L. A. 926, in which case the facts were quite similar to the present case.

"In that case suit was commenced by a paving contractor and its assignee against the City of Creston to recover the contract price for repairing certain pavements. Code provisions required that all contracts for street improvements be let to the lowest bidder after publication as set forth in

the Code. No publication was made and it was contended that the contract was illegal. Plaintiffs then amended by adding another count in which they sought to recover the equivalent of the contract price as the reasonable value of the labor and material furnished. In that case the court said:

'The statute is peremptory that, 'All contracts for the construction or repair of street improvements and for sewers shall be let in the name of the city to the lowest bidder by sealed proposals upon giving' prescribed notice. The statute is a prohibition upon letting such contracts in any other mode. * * The city undertook to have the repairs in question made by contract. Having undertaken to have them made by contract, it was required to let the contract on competitive bidding. * * * It is a general principle that a municipal contract entered into in violation of a mandatory statute, or a contract in opposition to public policy, is not merely voidable but void * * * and that no contract for services rendered or goods furnished pursuant thereto can be implied, nor may the acceptance of benefits thereunder be made the basis of a liability by estoppel. * * * A municipal contract let without competitive bidding, when the statute requires competitive bidding, is void, and no recovery may be had either upon the purported express contract or upon an implied contract to pay the reasonable value of the services or material furnished thereunder. * * * Manifestly the making of a contract may not be implied in a case in which an express contract is forbidden. * * *

'To sustain the plaintiff's contention would be to permit one to obtain from a municipality an illegal contract for doing work impossible of return and by performing it enable him to recover the reasonable value of the services and materials furnished—to nullify the law by evasion and indirection and to recover the value of the work done under a contract which the law prohibits.'

"The aforementioned annotation reviews cases from any states, some of which are cited by counsel for claimant. The decisions of our Supreme Court are in accordance with the weight of authority as set forth in such annotation, and inasmuch as our courts have passed upon the question, it will not be necessary to rely upon the decisions of the courts of other states. Some of the early cases in this State seem to support the contention of the claimant, but some of such cases have been expressly repudiated by the Supreme Court in the case of *DeKam vs. City of Streator*, hereinafter referred to; others have been impliedly overruled by such decisions; and still others upon careful analysis are distinguishable upon the facts from the later cases. In any event, if there is now any conflict between the earlier and the later decisions of our Supreme Court, the later decisions are controlling and must be taken to be the law of this State.

"In the case of *Hopc vs. City of Alton*, 214 Ill. 102, the city had adopted an ordinance creating a legal department, which provided for a corporation counsel, and also provided that the city should not be liable in any case for the services of any attorney except the corporation counsel. Thereafter the council passed a resolution authorizing the employment of a certain attorney other than the corporation counsel, in connection with a number of damage suits then pending. Such attorney rendered legal services in such cases and afterwards commenced suit against the city to recover the value thereof.

In that case the court held that the ordinance had the effect of a law within the corporate limits, that the contract made by the City Council was prohibited by such law and therefore void, and that the city was not estopped from denying its liability thereon by reason of the fact that it had received the benefit of the services rendered. In the course of its opinion the court said

'Counsel say, however, that plaintiff might recover on the ground that when a city has power to make a contract in one way and exercises the power in a different mode, it will be estopped from setting up the illegal exercise of power when called upon to pay for what it has received under the contract. In other words, the proposition is that when a city gets what it had authority to get in some way, it should pay for what it gets, whether it exercised the power in the prescribed way or not. The obvious answer is, that this contract was prohibited by a valid ordinance, and that the City Council had no right to make it in some other way or by some other method. The City Council had no authority, by any method or process, to agree that the city should pay for legal services to be rendered by the plaintiff, who was neither city attorney nor corporation counsel. The ordinance prohibiting such a contract was in full force and effect, and its operation as a law was in no manner affected by the resolutions. *People vs. Latham*, 203 Ill. 9.

'It is further contended that the city is estopped to deny its liability by the acts of the city council and its officers. The doctrine of *ultra vires* is applied with greater strictness to municipal bodies than to private corporations. (1 Smith on Mun. Corp. Sec. 661.) Persons dealing with a municipal corporation are chargeable with notice of its powers to contract, and plaintiff was chargeable with notice of the ordinance in question. A municipal corporation is not estopped from denying the validity of a contract when there was no authority for making it. To hold otherwise would be to expose the taxpayer to all the evils which statutes or ordinances passed for his protection were designed to prevent. Cases where municipal corporations have been held to be estopped when acting in a private capacity in the performance of duties enjoined upon them are not in point in this case, both because the city had performed the duty by providing a law department, with officers to discharge its duties, and also because the contract was directly prohibited by the ordinance.'

'The question here involved was very thoroughly considered by our Supreme Court in the case of *DeKam vs. City of Streator*, 316 Ill. 123. The complainants in that case filed their bill against the City of Streator to restrain such city and its officers from paying further money to one G. L. Clausen, pursuant to the terms of certain contracts theretofore made between the city and Clausen whereby he undertook to design a sewer system for the city. No appropriation had previously been made by the City Council for the payment of such work.

'Upon completion of the work Clausen presented to the Board of Local Improvements his bill for his services amounting to \$34,263.00, of which he had previously been paid \$3,000.00. Thereafter the council ordered payment of the bill. In that case the court held that the contract was void because

it was prohibited by law, and in considering the question there involved, said:

'A contract expressly prohibited by a valid statute is void. This proposition has no exception, for the law cannot at the same time prohibit a contract and enforce it. The prohibition of the legislature cannot be disregarded by the courts. * * *

'In many other cases contracts not prohibited by the express words of a statute but in violation of its terms have been held void, and it is a well established rule that where, from a consideration of all the provisions of the statute, the legislative intention clearly appears to declare an act unlawful no contract for the performance of that act can be enforced, and the rule applies to a contract to do an act contrary to the public policy of the State.'" * * *

We find that there was no authority for the printing work above enumerated in the sum of \$4,489.01, and that an award in favor of claimant for such sum is not justified.

A further contention is made by counsel for respondent that because of certain negotiations between the Superintendent of Printing and the claimant in May, 1933, as a result of which claimant reduced the cost of the automobile lists to \$1,227.50 per volume set that such action constituted a variance between the proposal submitted and the contract under which such printing was done, and that therefore the entire contract is invalidated. The record shows that a computation of the cost per volume set of such automobile lists under the itemized data contained in claimant's proposal, was approximately \$1,750.00. That no change was made in the detailed unit price for printing but that certain changes in the form and wording of the automobile lists was made under the later negotiations between the parties, as a result of which a price of \$1,227.50 was arrived at for the books in question.

While we agree with the Attorney General that contracts should not be let upon one basis and thereafter give the successful bidder an advantage over other parties by lessening the burden of the work required, yet in the instant case it does not appear that the claim is based upon any higher charge than that recited in the prices fixed under the original contract, or that the claimant receives any benefit from the change in the form of the automobile lists as put into effect in 1933. If the claimant sees fit to seek payment for its work on a lower basis than his contract calls for, this court does not feel called upon to enforce the higher charge or to invalidate the entire contract therefor. Nothing appears in the

original proposal or specifications as to the exact contents or quantity of printed matter to be found in such automobile lists, and we believe this objection is not good.

We therefore find:

1. That claimant and respondent entered into a valid contract on November 25, 1931, whereby claimant was to furnish certain printed matter of the sixth class to respondent for and during a term of eighteen (18) months, beginning with the first day of January, 1932 and ending with the 30th day of June, 1933.

2. That thereafter claimant did printing, binding and other incidental work for respondent prior to June 30, 1933 covering one hundred twelve (112) different items at an aggregate cost of \$71,369.77.

3. That of said total of \$71,369.77 the sum of \$4,489.01 was invalidly incurred and claimant is not entitled to an award therefor.

4. That there is due as a credit against said total, as conceded by claimant, an allowance because of paper stock furnished by the State, in the sum of \$4,848.58.

5. That valid and sufficient appropriations were made for said printing, and that funds remained in said appropriations sufficient to cover the cost of said items from time to time as required; but that the appropriation out of which the claim in question could have been paid lapsed on September 30, 1933.

6. That claimant filed its claim in the Court of Claims November 1, 1934.

7. That the Court of Claims has been open to an adjudication of said matter continuously and from month to month since that time.

8. That the first of claimant's testimony was not taken until January 5, 1939.

9. That while certain civil and criminal litigation is shown to have taken place in the interim, which involved matters pertaining to this claim, it does not appear that claimant was prevented from pursuing its rights in this court at any time. The question of the amount due claimant has been an issue in this case, and the sum due has been one of the items of dispute. Under the conclusions reached by us, a reduction of \$9,337.59 has been made in the claim, and interest on the balance is not justified.

Another factor as to the propriety of allowance of any interest on award herein is that subsequent to the time claimant became entitled to this money, the State became indebted to it for the further sum of \$12,001.37 for printing performed after June 30, 1933, for the payment of which, after the State declined to pay, claimant brought a mandamus suit and obtained a writ of mandamus, by which the State officials were compelled to pay said sum of \$12,001.37. No question is raised in the record as to why the claimant did not include in its mandamus suit the entire debt which it then held against the State of Illinois. If it could succeed, as it did in compelling the State to pay by mandamus, a part of the debt then owing to it, it would appear that it could have secured a right for its entire claim. We therefore find that no sufficient grounds appear for awarding interest to claimant by reason of alleged vexatious delays suffered by it in obtaining the redress here awarded.

As we view the record, that portion of plaintiff's claim for the sum of \$62,032.18 comes within the rule heretofore announced in other cases, as being for work validly contracted and unpaid for, and for which payment should therefore be made.

"Where the facts are undisputed that the State has received supplies as ordered by it, and that such supplies were legally bought by the State, and that funds remained in the appropriation therefor at such time, and that claimant submitted bills therefor within a reasonable time, and due to no neglect or fault on the part of claimant, same were not approved and vouchered for payment before the appropriation from which the payment could have been made had lapsed, an award for the amount due will be made."

Rock Island Sand & Gravel Co. vs. State 8 C. C. R. 165.

An award is therefore made in favor of claimant for the sum of \$62,032.18.

(No. 2388—Claimant awarded \$1,083.00.)

PAUL A. YOGGERST, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 22, 1939.

CLARENCE B. DAVIS, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

PERSONAL INJURY—member of Illinois National Guard—when award for compensation for may be made. An award may be made to member of Illi-

Illinois National Guard, for compensation for personal injuries, sustained by him while in the performance of his duties, as such, under authority of Sections 10 and 11 of Article XVI of Military and Naval Code.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Prior to and on June 6th, 1933 the claimant, Paul A. Yoggerst, was a sergeant in Troop F, 106th Cavalry, Illinois National Guard. On the last mentioned date, while participating in authorized military drill at the Coliseum in the State Fair Grounds at Springfield, Illinois, he was thrown from his horse and trampled, whereby he was injured in and about his right ankle, right arm, right shoulder and spine. He was under the care of Dr. David H. McCarthy of Springfield, his family physician, from June 6th to June 21st, 1933. Thereafter he was treated at the Illinois Research Hospital and the College of Medicine, Department of Neuropsychiatry, in Chicago.

Claimant was twenty-nine years of age at the time of the injury, was a single man and had no dependents. Prior to the time of his injury he was employed as a clerk in his father's grocery store and market in Springfield, and was paid from \$10.00 to \$15.00 per week in addition to board and room.

About four months after the injury he returned to his former employment, and during the first few months thereafter was able to perform about half of his usual duties. He was partially incapacitated for over a year after the injury, but the only permanent disability is in the right arm. He participated in a horse show held at the State Fair Grounds on May 30th, 1934, and placed third in the Olympic Hurdles, and second in the Jumpers. He is still working as a clerk in his father's grocery, and is earning slightly more at this time than he did at the time of his injury.

He continued on the active list with the Illinois National Guard until January 23d, 1939, when he was placed on the inactive list in the capacity of a second lieutenant.

At the time of the taking of testimony herein (March, 1939) he was able to perform the usual work incident to his employment, but would not have been able to perform the ordinary work of a laborer. Apparently his recovery has been complete as to all of his injuries except the injury to his right arm.

There was an injury to the muscles and nerves of the right arm and a severe confusion of the cervical spine which induced a trauma of the brachial plexus, with a resulting atrophy of the muscles of the arm and forearm, from which there has been a partial recovery.

Claimant's right to an award is based upon the provisions of the Military and Naval Code of this State (Ill. Rev. Stat. 1937, Chap. 129), Sections 10 and 11 of Article XVI of which are as follows:

Sec. 10. "Any officer or enlisted man of the National Guard or Naval Reserve who may be wounded or disabled in any way, while on duty and lawfully performing the same, so as to prevent his working at his profession, trade or other occupation from which he gains his living, shall be entitled to be treated by an officer of the medical department detailed by the surgeon general, and to draw one-half his active service pay, as specified in Sections 3 and 4 of this article, for not to exceed thirty days of such disability, on the certificate of the attending medical officer; if still disabled at the end of thirty days, he shall be entitled to draw pay at the same rate for such period as a board of three medical officers, duly convened by order of the Commander-in-Chief, may determine to be right and just, but not to exceed six months, unless approved by the State Court of Claims."

Sec. 11. "In every case where an officer or enlisted man of the National Guard or Naval Reserve shall be injured, wounded or killed while performing his duty as an officer or enlisted man in pursuance of orders from the Commander-in-Chief, said officer or enlisted man, or his heirs or dependents, shall have a claim against the State for financial help or assistance, and the State Court of Claims shall act on and adjust the same as the merits of each case may demand. Pending action of the Court of Claims, the Commander-in-Chief is authorized to relieve emergency needs upon recommendation of a board of three officers, one of whom shall be an officer of the medical department."

All medical, surgical and hospital services were performed by the respondent, and the claimant was paid the compensation to which he was entitled under the aforementioned provisions of the Military and Naval Code.

The only question now for consideration is the amount of compensation to which claimant is entitled for the injuries sustained by him as above set forth.

The only testimony in the record regarding the extent of claimant's injuries is the testimony of the claimant himself, and the testimony of the treating physician. From such testimony it appears that the claimant was totally and permanently disabled for approximately four months after the accident; that he was partially disabled for an additional

period of over eight months; and that he has a permanent disability of his right arm.

Under all of the facts in the record, we feel that claimant is entitled to additional compensation in the sum of Ten Hundred Eighty-three Dollars (\$1,083.00), and an award is therefore entered in favor of the claimant for such amount.

(No. 2794—Claimant awarded \$5,790.89.)

MOORE BROS. CONSTRUCTION COMPANY, A CORPORATION, Claimant, vs.
STATE OF ILLINOIS, Respondent.

Opinion filed May 26, 1939.

KRAMER, CAMPBELL, COSTELLO & WIECHERT, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

DAMAGES—measure of—breach of construction contract—party not at fault electing not to perform part of. Where claimant, party to contract with State, for construction of public highway, is ready and willing to perform same, in accordance with the provisions thereof, and through no fault or negligence on its part, but due solely to acts of State is delayed in performing a part thereof, and contract as to said part is cancelled by agreement of the parties, without prejudice to claimant to sue for damages for loss sustained as a result of such cancellation, the proper measure of damages for the loss incident to such cancellation, is the profit which claimant would have made on the construction of such part, if it had been able to complete it.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim arises out of the construction of a part of S. B. 1. Route 177, Section 109, which extends from the Junction with S. B. 1. 15 in Okawville easterly seven and one-half (7½) miles to Station 449 in Washington County. From Station 449 Route 177 continued east through New Minden where it intersects Route 153.

The original survey for Route 177 was made by the Division of Highways in 1926. Two routes out of Okawville were indicated on the survey maps, a so-called east route and a north route. The Chief Highway Engineer indicated his opinion that the north route was the most feasible. Individuals interested in these two routes procured deeds for the respective rights-of-way for as much property as they could

obtain. Deeds for the north route were never delivered to the Divisions, but such deeds were procured in an effort to induce the Division to select the respective routes.

On March 24, 1931 the Director of the Department of Public Works and Buildings and the Chief Highway Engineer entered an order officially locating the road over the east route. This road began at Station 28+00 in Okawville, went due east about three miles, then northeast about four miles to Station 120, from which point the road extended eastward to Station 449. Necessary right-of-way for this route was partly obtained by voluntary conveyances, and in February, 1932 the Department caused suit to be filed in the County Court of Washington County to condemn the right-of-way for the east route over such required lands as had not been deeded. July 1, 1932 the County Court entered judgment authorizing construction over the east route and awarded damages in excess of \$2,500.00, which together with court costs and other expenses was raised by the people of the community, in a total sum of over \$3,500.00.

On September 30, 1932 the Department awarded a contract to George B. Richardson of Decatur for the construction of the Plum Creek Bridge just east of Okawville on said route; also a contract to claimant for construction of culverts, grading, concrete pavement, etc., for such east route and extending eastward from Station 120, at a total project cost of \$128,329.60.

October 13, 1932 claimant began construction operations. October 20, 1932 a contract for the project was executed by the claimant and the Department of Public Works and Buildings. This contract provided that claimant would complete the project on or before June 15, 1933. Claimant sub-contracted all grading operations to A. L. Brady, and the subcontractor moved in his equipment and began operations November 7th. Richardson began operations on the Plum Creek Bridge on January 11, 1933, using a crane owned by claimant. Prior to January 17, 1933 claimant ordered cement from various companies and on the latter date cancelled the order for the unshipped balance of 23,978 barrels with the Alpha Portland Cement Company, and was authorized to order same from the Marquette Cement Manufacturing Company.

Meanwhile, citizens of the community who were interested in the north route continued their efforts for a relocation over the so-called north route. This portion would extend north out of Okawville from Station 28+00, and would then turn east for a distance of several miles until it reached Station 120, where the two disputed routes would intersect. January 18, 1933 the Highway Division ordered claimant to cease operations, and on the following day rescinded this order. The Attorney General rendered an Opinion to the Department under dates of January 25th, April 7th, and May 31, 1933; that the Department did not have power to change the location and could not acquire the right-of-way over the north route by eminent domain because it had already exhausted such power by locating the road and acquiring the right-of-way over the east route. On February 24, 1933 claimant was notified by the Department through its District Engineer that no work was to be done on that portion of the contract west of Station 120, but that there were no restrictions in regard to the balance of the work. This restriction affected only the short disputed sections involved in the two proposed routes.

Article 3.2 of the Standard Specifications for Road & Bridge Construction, which was a part of the contract in question, provides that a Progress Schedule shall be filed by the contractor when requested. Under such schedule as submitted by claimant he agreed to finish the paving at Station 10+09, being a short section of pavement in Okawville just beyond the west terminal of the two disputed routes, by June 1, 1933. This date must be borne in mind when considering any change in plans, expense or any inconvenience which was caused by reason of the non-construction by claimant of the disputed section of paving. Claimant R. J. Moore testified that of the equipment that was on the job west of Station 120 none was used on any other work until after it was released on July 10, 1933; that the culvert equipment was idle until July 10th and that the other equipment was idle up to April 15, 1933.

The controversy over the north and south routes was taken by appeal to the Supreme Court and on February 21, 1935 an Opinion was filed by the latter, the case being entitled "*The Department of Public Works & Buildings vs. Adolph*

L. Schlach, 359 Ill. 337," wherein the court held that the Department had no authority to change the route, and the judgment of the Circuit Court of Washington County was reversed. On September 6, 1933 respondent, through the Division of Highways, notified claimant in writing that due to right-of-way difficulties it was understood that claimant would be unable to complete its paving on the portion of the work then in dispute, and that claimant was under no obligation to keep its equipment on this section after it had completed the work within the limits on which the right-of-way was settled. Claimant offered in 1935 to complete the work at an increased cost estimate, and on July 16, 1935 they were informed that if they proceeded with the work, it would have to be in accordance with the plans and at the unit prices stated in the contract. By agreement a cancellation of that portion of the contract pertaining to the section of road in dispute was effected, and claimant was released from performing such work, the release being without penalty and with the understanding that the contractors may proceed to secure judgment through the Court of Claims for any losses previously incurred, it being understood that claimant reserves all rights to file and prosecute a claim against the State for damages sustained, by reason of the failure by the State to secure the right-of-way, and for any other damages incident thereto. Conferences were had between the representatives of the Highway Department and claimant in an effort to arrive at what damages claimant may have suffered. The figures arrived at by the Highway Department, based upon rental value of equipment for the period of delay from June 19th to September 6th and for time allowance for A. P. Moore, General Superintendent, J. G. Moore, Foreman, and R. Stephen, Time-keeper, and workmen's compensation insurance amounts to a total of \$9,467.51. This was later corrected to \$9,011.33. Sub-contractor Brady's damages were estimated at \$7,125.38. Claimant contends that its actual damages for itself and Brady by reason of extra cost for superintendents, rentals, etc., amounted to \$13,483.27 and of the Sub-contractor Brady for whom it acts, of an additional sum of \$11,176.35. Claimant contends that although Brady did not have a contract with the State, he had a sub-contract with the claimant with the permission of the State, and that

The same rules which apply to claimant's damage would apply to Brady's. Claimant contends that the aggregate of the two sums is owing to the claimant and it is liable to Brady for the amount of Brady's damage. The rental values as considered by the Highway Department were under cost of ownership schedules of the Associated General Contractors of America and are figured upon depreciation, overhauling, major repairs, painting, interest, taxes, storage and insurance. The rates shown in claimant's Exhibits C, D and E are based upon the experience of contractors operating throughout the United States and engaged in many types of construction, including only in part highway construction. The record shows that a roadster for which credit was taken in claimant's figures was available to claimant at all times for private use; that the Boss mixer and certain other equipment were peculiar in use for culvert and small bridge construction and are not to be confused with paving operations; that the trucks and Ford flat body were available for other paving work.

As the apparent decrease or shortening of the proposed pavement under the contract in question amounted to only 14.4 per cent of the total contract price, it would appear from the foregoing that the respondent had a right to cancel and leave out entirely the disputed section of highway, and that no allowance would be made to the contractor for any change in his anticipated profit under the contract. No contention to this effect has been made by the Attorney General however, and the only issue before the court is the proper measure of damages upon which to base claimant's recovery, and the amount of the award to which he should, under the facts, be entitled.

Claimant contends that the least amount to which it should be entitled is the amount of damage estimated by the Highway Department in a conference between it and the representatives of the Highway Department. Respondent contends that the contractor had a right to either of two courses: to have finished the contract in full and then to have sued for the damage due to its being delayed; or, to decline as it did to complete its contract and to thereupon claim damages for what its profit would have been on the remainder of the work had it been permitted to have performed same in due time

and without interruption by matters chargeable to respondent.

The change in the length of pavement resulted in a reduction in the total contract amounting to \$22,930.53 or 14.4 per cent of the total contract price.

Article 4.3 of the Standard Specifications for Road and Bridge Construction which were a part of the contract in question provides:

"The Department reserves the right to alter the quantities of work to be performed or to extend or shorten the improvement, provided the total price for all such alterations, extensions, or deductions does not exceed twenty-five (25) per cent of the original contract price, or contract price corrected as provided in Article 2.2. Should any of the changes provided herein be made, the contractor shall perform the work as altered, increased, or decreased at the contract price. No allowance will be made for any change in anticipated profits nor shall such changes be considered as waiving or invalidating any condition or provision of the contract."

It does not appear that the right of the Department to alter, extend or decrease the proposed improvement must depend upon any certain grounds, but that the Department reserves the right to alter the contract for any cause so long as the alteration or deduction does not exceed 25 per cent of the original contract price; further, that no allowance will be made for any change in such case for anticipated profits. That portion which was cancelled from the contract of claimant was afterwards awarded to another contractor and constructed by him.

No substantial delay to claimant was caused by respondent as to any of its work under the contract except as to the disputed section. There was apparently however some delay because of other matters not chargeable to respondent, for claimant did not finish its paving operation at Station 120 until August 31st. It began paving at Station 28 September 2nd and finished the stretch of pavement in Okawville at Station 10+09 on September 5, 1933. On September 6, 1933 the Engineer in charge advised claimant that he was under no obligation to keep his equipment, particularly his paving outfit, on the section, if all the work within the limits on which the right-of-way was cleared, had been completed. Claimant agreed to a cancellation as to the balance of his contract and the court is of the opinion that the proper measure of damage sustained by it for the loss incident to such cancellation is the profit which claimant would have made had it been able

to have proceeded with the construction of the remaining 14.4 per cent of the work for which it had contracted. Counsel for claimant in his Reply Brief (p. 12) concedes that, "If claimant had immediately quit work on February 24, 1933 and moved its equipment, that loss of profit would have been the basis of damages, but that it kept its equipment, maintained its overhead and did all the things which it did until July 12, 1933 and was then relieved of its contract and was told it could move its equipment and use it elsewhere (on other state contract work) which it did, stopping the damages."

The fact remains that claimant elected not to complete its contract and under the rule laid down in the case of *Guerini Stone Co. vs. Carlin*, 240 U. S. 264, we believe the proper measure of damages is the loss of profits incurred. In that case the court said:

"There was testimony as to the profits that plaintiff probably would have gained if the contract had been proceeded with in the ordinary manner. But this question was excluded from the consideration of the jury upon the ground that the profits were contingent and speculative. In this there was error. The testimony was from an experienced witness, and included an estimate of the total cost to plaintiff of the doing of the work called for in sub-contract. This amounted to \$53,012.00. The contract price was \$64,750.00. The witness testified that a profit of \$9,700.00 would have been made. Whether he intended to say \$11,700.00 was for the jury to determine. No more definite or certain method of estimating the profits could well be adopted, than to deduct from the contract price the probable cost of furnishing the materials and doing the work. *Phila., Wtl. & Balt. R. R. vs. Howard*, 13 How. 307, 344; *Hockley vs. Pittsburgh Steel Co.*, 121 U. S. 264."

Claimant cites the case of *Underground Construction Co. vs. San Dist.*, 367 Ill. 360, wherein claimant had a contract for construction work to be paid for in monthly installments. The installments not being paid when due, claimant discontinued the work until payments were made, whereupon it resumed and completed its work. A supplemental contract was made at the time the work was resumed, extending the time for completion, waiving penalty clauses against the contractor incident to the time limits, and further reciting that plaintiff claimed special damages by reason of such delay, for which defendant denied any right to recovery. After the completion of the work and settlement of the contract price, plaintiff sued the defendant for special damages resulting from the delay. The court held that damages for delay of work caused by failure to pay installments when due were

within the contemplation of the parties as expressed in the contract, and that such delay in payment constituted ground for special damages. The court found however that the measure of such damages was provided for and limited by specific recitals in the contract, being restricted to wages of necessary watchmen and extra premium on bond, and the court reversed the judgment of the Appellate Court which had affirmed a judgment of the Superior Court of Cook County of \$60,866.58.

This case does not, as we read it, meet the contention raised by the Attorney General that the measure of damages in the instant case, wherein plaintiff saw fit to take a reduction in its contract and to abandon the construction of 14.1 per cent thereof because of the delay of respondent in furnishing right-of-way, should be the amount of profit which he would otherwise have made had he completed the contract in full.

Neither this case nor the others cited by claimant negative the rule that where contractor fails to complete his contract through the fault of the other party, the proper measure of damage would be his proportionate profit on the balance of the work in question.

The portion of the contract price which would have been paid claimant had it performed its entire contract, amounted to \$22,930.53. The record discloses that claimant's profit on the entire contract as originally awarded, was estimated at 17% to 18%. In addition to the percentage of profit on the entire job, the evidence for the claimant shows that it lost an additional profit of \$1,892.70 which it would have made by reason of the short haul on that portion of the project which it did not complete. Claimant's profit on that portion of the contract which it rightfully abandoned because of respondent's breach would therefore be 17% of \$22,930.53 plus \$1,892.70, to wit, a total of Fifty-seven Hundred Ninety Dollars and Eighty-nine Cents (\$5,790.89).

A part of the work for which claimant would have been paid the sum of \$22,930.53 would apparently have been done by the sub-contractor Brady, but there is nothing in the record which would form a basis upon which the court could apportion this sum or the profit therefrom between claimant and Brady. As conceded by claimant in its reply brief, the aggregate of the damages sustained by the two is owing to the

claimant, and its liability to Brady is a matter between themselves.

Award is therefore hereby entered in favor of the claimant in the sum of Fifty-seven Hundred Ninety Dollars and Eighty-nine Cents (\$5,790.89).

(No. 2416—Claimant awarded \$500.00.)

MAE SMILANICH, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 26, 1939.

SOLOMON AXELROD, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—construction of public improvement—measure of. Where private property is not taken for public use, but is damaged by reason of construction of public improvement, the proper measure of damages is the difference between the fair, cash market value of the property unaffected by the improvement and its fair cash value as affected by the improvement.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks an award of Five Thousand (\$5,000.00) Dollars for alleged damages to Lot Six (6) in Block Three (3) in Hubbard's Addition to the Village of Algonquin, Illinois, which she says resulted when the respondent through its Department of Highways, elevated the road on S. B. I. Route 62 along the frontage of said premises. The record indicates that the correct description should be the South Half of Lots Five (5) and Six (6). At any rate claimant's property is in the Northeast Corner of the intersection of Route 62 and River Road and is a plot of approximately 133 feet on Chicago Avenue and 66 feet on what is known as River Road. Claimant bought the land in 1927 for Five Thousand Nine Hundred (\$5,900.00) Dollars. At that time it was improved with a house, three rooms below and five rooms above. Before the construction work S. B. I. Route 62 was a gravel road 20 feet in width with an open ditch 1½ feet in depth and 5 feet in width which extended the full length of claimant's property. The elevation of the ground at the property line was approximately 5 feet higher than the center line of the road at the west end of the property, 10 feet higher at the east end of the house and 12 feet higher at the east end

of the property. At no place along the street was it possible to build a vehicular entrance. The house was an old two-story frame dwelling with upper and lower entrances facing Route 62; one was to the first floor and was approximately 6½ feet above the center line of the road before the construction work. The other entrance was approximately 10 feet east on the first floor and led to the second floor and was about 12½ feet above the center line of the road before the construction work in question. An outside wooden stairway led from the entrance of the second floor to the ground line. Adjoining this was a concrete retaining wall approximately 5 feet in height and extending toward the center line of Route 62 from the house for a distance of 17 feet, where it turned east and ran parallel with Route 62 for a distance of 21 feet. Raising the road has made possible a vehicular driveway into the property at a point just east of where the house formerly stood. Claimant has torn down the old building, and the property is now unimproved except for a small shed which she later built at the rear of the premises. The County of McHenry through its Right-of-way Committee attempted to make a settlement with the owner at the time of the building of this highway. It offered to pay her Two Hundred Thirty-five (\$235.00) Dollars as damages, and the State would fill her property up to grade level. Claimant declined this offer at the time and later requested the County to renew the offer which the County declined to do. Testimony was introduced by the parties and a report from the office of the Division of Highways appears in the record. In addition thereto, the court made a personal inspection of the premises in order to familiarize itself better with the evidence as it appears in the record. The testimony as to value is conflicting and confusing, and we do not deem it necessary to a decision of the case to review the evidence in detail. From a study of such evidence and from a personal inspection of the premises, the court finds that claimant has suffered resultant damages, to property not taken for public use, caused by construction of the public highway in question; further, that the proper measure of damages is the difference between the fair cash market value of the property unaffected by the improvement and its fair cash market value as affected by it.

From a consideration of all the evidence in the record and the personal inspection had of said premises, the court

further finds that Five Hundred (\$500.00) Dollars is a fair and equitable and legal allowance for the damages sustained herein.

An award is therefore hereby made in favor of Claimant Mac Smilanich in full recompense of said claim.

(No. 3344—Claim denied.)

MIDLAND OIL COMPANY, AN ILLINOIS CORPORATION, Claimant, vs.
STATE OF ILLINOIS, Respondent.

Opinion Aled June 13, 1939.

MAURICE A. FRANK and ROBERT H. ELLISON, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

MOTOR FUEL TAX—*sale of fuel by distributor on credit—constitutes taxable sale under—distributor liable for tax when not paid by purchaser.* A sale of motor fuel, on credit, by a distributor, constitutes a taxable sale under the provisions of the Motor Fuel Tax Act, and if he fails to collect tax from purchaser, he is liable therefor.

SAME—*claim by distributor for refund of tax remitted, where fuel sold on credit and tax not paid by purchaser—must be denied.* There is no provision in the statutes which entitles a licensed motor fuel distributor to a refund of motor fuel tax, remitted by such distributor, on sales of fuel under Motor Fuel Tax Act, where such distributor made said sales on credit and failed to collect tax at the time of sales, and who is unable to do so thereafter.

MR. JUSTICE LINSCEOT delivered the opinion of the court:

The Midland Oil Company, an Illinois Corporation, filed its complaint with the clerk of this court on January 14, 1939, alleging that it was engaged in the business of distributing and retailing motor fuel in the City of Chicago and State of Illinois; that it is equipped to do that business and is associated in business with the Sterling Fuel Oil Corporation also licensed to do business in the State of Illinois, and that all tax payments set forth in the bill of particulars were made by the Sterling Fuel Oil Corporation on behalf of the claimant.

Claimant quotes Section 6 of the Motor Fuel Tax Law and avers that there is no prohibition in the Motor Fuel Tax Law against the extending of credit by a distributor and retailer, to the user of motor fuel, and that it is the custom and usage and always has been the custom and usage in the motor

fuel trade, for the distributor and retailer of motor fuel to extend credit to the user thereof, and that in accordance with the custom and usage of the trade, the claimant did extend credit to many accounts to whom it sold motor fuel for use, and caused to be paid to the State of Illinois, through the Sterling Fuel Oil Corporation, three cents per gallon on the gallonage sold to the accounts to whom credit had been extended.

It is also averred that in the case of many of the accounts to whom credit was extended, claimant failed to collect the amount of the purchase price of the motor fuel sold to these accounts and failed to collect the motor fuel tax paid over by claimant in advance to the State of Illinois, and that many of these accounts have either gone out of business, become insolvent or bankrupt as appears from the bill of particulars attached to the complaint.

It is also averred that claimant made every possible reasonable effort and availed itself of every possible legal recourse in attempting to collect to the extent of, in one case, contesting the sale of business in the Supreme Court of the State of Illinois. The bill of particulars sets forth the dates of the sales, the names of the delinquent customers and the amounts of the indebtedness.

It is also averred that the claimant was acting as the agent of the State of Illinois in collecting motor fuel tax, and exercised reasonable diligence in attempting to collect the motor fuel tax from the accounts listed in the bill of particulars, but despite the diligence used in attempting to collect such accounts, it was unable to do so. The accounts date back to June 15, 1933 and there were several during the year 1933.

The total amount claimed is the sum of \$4,313.63.

Shortly after the above named claim was filed, the Attorney General filed a motion to dismiss and bar the claim, and as grounds for the motion says that the complaint does not set forth a claim which the State of Illinois, as a sovereign commonwealth, should discharge and pay for the reason that there is no provision of law which entitles a licensed motor fuel distributor and retailer to a refund of motor fuel tax remitted by it on sales of gasoline used in motor vehicles upon the public highways where such distributor and retailer made said sales on credit and was unable thereafter to collect from the vendees.

The Attorney General refers to Section 2 of the Motor Fuel Tax Act (1929) (Chap. 120, Ill. Rev. Stat. 1937), which imposes a tax of three cents per gallon on motor fuel used in motor vehicles operated upon the public highways. Reference is also made to Section 3 of the same Act which requires that each distributor of motor fuel be licensed by the Department of Finance and give bond. Section 4 is set forth in considerable detail, and is to the effect that

"Every person holding a valid unrevoked license to act as a distributor of motor fuel shall, between the first and twentieth days of each calendar month, make return, under oath, to the Department, showing an itemized statement of the number of invoiced gallons of motor fuel purchased, acquired or received, the amount produced, refined, compounded, manufactured, blended, sold, distributed, and/or used by him during the preceding calendar month, the amount lost or destroyed, and the amount on hand at the close of business for such month; and in the case of a sale to another licensed distributor, as hereinafter provided in Section 6, the amount of motor fuel so sold, the name, address and license number of such purchasing distributor."

The Attorney General also makes reference to Section 6, which provides in part, as follows:

"Each distributor who sells any motor fuel for any purpose shall (except as hereinafter provided) collect from the purchaser at the time of such sale, three cents per gallon on all motor fuel sold, and at the time of making his return, the distributor shall pay to the Department, the amount so collected, (less the deduction hereinafter provided) and shall also pay to the Department three cents per gallon on all motor fuel used by him during the period covered by the return."

Claimant's counsel argue, in opposition to the position of the Attorney General, that claimant's complaint sets forth a claim which the State of Illinois should discharge and pay even though there is no specific provision of law upon which the claim for refund is based, and argue that said claim for refund is based upon Sub-division 4 of Section 6 of the Court of Claims Law, which provides that the Court of Claims shall have power:

"to hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, ex contractu and ex delicto, which the State as a sovereign commonwealth should in equity and good conscience discharge and pay."

The equity and good conscience law is relied upon by claimant here.

This court had before it the same doctrine in the case of *Crabtree vs. State of Illinois*, 7 C. C. R., page 207. We there held that:

"The provisions of paragraph 4 of Section 6 of Court of Claims Act with reference to equity and good conscience merely defines the jurisdiction of the court and does not create a new liability against the State nor increase or enlarge any existing liability and limits jurisdiction of court to claims under which State would be liable in law or equity, if it were suable, and where claimant fails to bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure one."

Counsel for claimant refers to the case of *People vs. Kopman*, 358 Ill., page 479, and quotes therefrom as follows:

"The tax was delivered into the hands of the defendant as the agent of the State. The money was 'delivered' to him in the sense that word is used in Section 74 of the Criminal Code."

and in commenting thereon, claimant argues that this decision makes it clear that the distributors' duty to turn over to the State tax money collected by the distributor is absolute, but this decision under the "duty to collect" in no way excludes the reasonable extending of credit. The Supreme Court of Illinois in the *Kopman* case did use the language referred to by claimant, and went further. We quote from the bottom of page 482 and the top of page 483 as follows:

"The statute makes the distributor the agent of the State as a collector of the tax. It comes to his hands while he is acting in a fiduciary capacity as agent of the State for its collection. It in no sense belongs to the distributor but is the property of the State. Section 15 of the Act, as amended by an Act approved July 3, 1931, provides: 'Whoever * * * willfully fails or refuses to make payment to the Department of Finance as provided in either Section 6 or Section 7, shall be punished by a fine of not to exceed \$5,000 or by imprisonment in the penitentiary for not less than one year nor more than five years or by both such fine and imprisonment.'"

Section 2 of the Motor Fuel Tax Act (Smith's Stat. 1933, chap. 120, par. 418) provides: "A tax is hereby imposed on the privilege of operating motor vehicles upon the public highways of this State after July 31, 1929, at the rate of three cents per gallon of all motor fuel used in such motor vehicles upon such public highways." Other sections of the Act define a distributor of motor fuel, provide for the licensing and bonding of distributors and for monthly returns to the Department of Finance. Section 6 of the Act requires each distributor to collect from the purchaser at the time of sale three cents per gallon on all motor fuel sold.

Claimant argues that the Act does not exclude or prohibit a distributor from extending reasonable credit. That is

true, and it would be an unlawful interference with the distributor's business if it did. If for business reasons a distributor desires to extend credit, that is entirely within his discretion. Section 6 of the Act requires each distributor to collect from the purchaser at the time of sale, three cents per gallon on all motor fuel sold. The above statement of claimant is only partially true. The law requires a collection of three cents from the purchaser at the time of the sale and the distributor has no power to extend credit for the amount of the sales tax.

In passing, it might be remarked that this is not an income tax and business losses are not deductible.

Claimant argues that an interpretation of the language of the Motor Fuel Act as prohibiting distributors from extending credit would result in the language meaning that the Act requires the distributor to pay the tax out of the distributor's own funds in such cases where the distributor did extend credit and failed to collect. This contention is answered by reference to Section 6 of the Motor Fuel Act above referred to.

Citations from the case of *State vs. Liberty Oil Company*, 97 So. 438 and *Standard Oil Company vs. Brodie*, 153 Ark. 114 are also cited and relied upon by claimant, but after a careful consideration thereof, we find no authority for holding that a distributor is not bound to pay the tax under the facts in this case. A distributor may extend credit under the Illinois Motor Fuel Act for the purchase price of the motor fuel, but must adhere to the opinion of the Supreme Court of Illinois in the case of *The People vs. Kopman*, 358 Ill. on page 482 wherein it is said: "Section 6 of the Act requires each distributor to collect from the purchaser at the time of sale three cents per gallon on all motor fuel sold" and we must hold that a sale takes place when the article is sold upon credit just the same as if cash had been paid therefor. There was no reservation of title, and by the nature of things, a conditional sale for motor fuel under the conditions here, did not take place.

An award, therefore, will be denied.

(No. 3123—Claimant awarded \$842.19.)

ELIDA DEVENKORN, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 13, 1939.

BENSON, FITCH & HEINEMANN, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MUNN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made under*. Where it appears that employee sustains accidental injuries arising out of and in the course of her employment, while engaged in extra hazardous employment, an award for compensation for same may be made in accordance with provisions of Act, upon compliance with terms thereof.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

For more than one year prior to March 8th, 1936, claimant was employed by respondent as an attendant at the Chicago State Hospital at Dunning, Illinois.

On the last mentioned date, about 6:30 A. M., while on her way from the Nurses' Home, where she had remained overnight, to Ward C, where she was to go on duty, she tripped and fell over a water pipe lying across the sidewalk, whereby she sustained a fracture dislocation of the left arm at the elbow. She was immediately taken to the institution hospital where the dislocation was reduced by Dr. George E. Rooney, a member of the staff. She remained at the hospital until March 20th, 1936 and returned to work approximately two weeks after the date of her injury. Her arm was still in splints at that time, and she was given lighter work than she previously performed, and thereafter continued in the performance of such work to the time of the hearing herein.

She remained under the care of Dr. Rooney for some time, and received treatments in the physical therapy department of the institution for the improvement of the condition of her arm;—the last treatment being in the summer of 1937. On October 26, 1937, Dr. Rooney again examined claimant and found that she had a limitation of motion in the left arm, and that such condition was permanent.

The record shows that the institution grounds have an area of approximately one-half mile square or more; that the

institution has its own heating plant, as well as a power plant, and laundry, all equipped with power-driven machinery; also steam pressure cookers, elevators, and numerous motor trucks.

Upon a consideration of all of the evidence in the record, we find that on the 8th day of March, A. D. 1936, the relation of employer and employee existed between the respondent and the claimant, and that they were then operating under the provisions of the Workmen's Compensation Act of this State; that on said date claimant sustained an accidental injury which arose out of and in the course of her employment; that the respondent had notice and knowledge of the accident immediately after the occurrence thereof; that the annual earnings of the claimant were \$912.00 and her average weekly wage was \$17.53; that claimant at the time of the injury had one child under the age of sixteen years; that all necessary first aid, medical, surgical and hospital services, as well as physical therapy treatments for the improvement of the condition of claimant's left arm, were provided by the respondent, and that the last mentioned treatments were continued to the summer of 1937; that claimant was temporarily totally disabled for the period of two weeks from the date of her injury as aforesaid; that claimant was paid her full wages during and subsequent to the period of her temporary total disability as aforesaid; that as the result of the injury so sustained by the claimant as aforesaid, she has suffered the loss of thirty-five per cent (35%) of the use of her left arm; that claimant is therefore entitled to have and receive from the respondent the sum of Eleven Dollars (\$11.00) for one week's temporary total disability pursuant to the provisions of Paragraphs (b) and (j) of Section Eight (8) of the Compensation Act as amended, and is also entitled to have and receive from the respondent the further sum of Eleven Dollars (\$11.00) per week for 78.75 weeks for the permanent loss of thirty-five per cent (35%) of the use of the left arm, as provided by Paragraph (e) of Section Eight (8) of the Compensation Act, as amended, to wit, the sum of Eight Hundred Sixty-six Dollars and Twenty-five Cents (\$866.25); that claimant has received the sum of Thirty-five Dollars and Six Cents (\$35.06) to apply on the compensation due her; that the remainder of the compensation due her, to wit, Eight Hundred Forty-two Dollars and Nineteen Cents (\$842.19), was accrued prior to this date.

Award is therefore entered in favor of the claimant for the sum of Eight Hundred Forty-two Dollars and Nineteen Cents (\$842.19).

This award being subject to the provisions of an Act entitled "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," approved July 3d, 1937 (Session Laws 1937, p. 83), and being by the terms of such Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the General Fund in the manner provided for in such Act.

(No. 3094—Claimant awarded \$4,500.00.)

JOHN B. ANDERSON, RECEIVER BY APPOINTMENT OF THE CIRCUIT COURT OF WILL COUNTY, ILLINOIS, IN CASE NO. 39672, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 13, 1939.

BARR & BARR, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

ILLINOIS WATERWAY—damages to property resulting from construction of—Court of Claims has jurisdiction in. Since the repeal of Section 24 of the Illinois Waterway Act, the Court of Claims has exclusive jurisdiction of a claim for damages to property resulting from the construction of the Illinois Waterway.

SAME—damage to property not taken for public use by reason of construction of—measure of. Where property of an abutting owner is not taken for public use, but is damaged, by the construction of the Illinois Waterway, the proper measure of damages is the difference between the fair, cash market value of the property, unaffected by such construction, and its fair cash market value, as affected by it.

SAME—same—what funds available to pay award for—validity of appropriation for. Where an award is found to be justified for damage to private property, not taken for public use, by reason of construction of Illinois Waterway, same would be legally payable out of any funds available for the building, enlargement, maintenance or extension of the I. & M. Canal or of the Illinois Deep Waterway, and an appropriation by the legislature therefore would be valid.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein seeks damages of \$41,000.00 alleged to have been caused by the construction of a bridge on Cass

Street over the Illinois Waterway in the City of Joliet, Illinois. The property in question lies immediately east of the Illinois Waterway on the north side of Cass Street and has a frontage of seventy-five feet on the latter. The rear of the lot angles northeast, and the longest side of such lot adjoins an alley on the east for a distance of one hundred thirty-two feet north and south. Prior to 1927 this property was occupied by the Joliet Sheet Metal Company. In that year the company sold the property to William J. Kexel and Joseph F. Skrinar, the former having previously had an interest in the above named company. They paid \$18,500.00 for the property in 1927. Soon thereafter they removed the old frame buildings, leveled the ground, filled it in and rented it to a woman for a root-beer stand. Up to that time the waterway was known as the old I. & M. Canal, which with the Des-plaines River, was afterwards made a part of the Illinois Waterway. About a year before the Illinois Waterway was constructed Kexel and Skrinar rented this piece of ground to an Edward Kelly for a gasoline service station. Kexel testified that Kelly understood he was to have a filling station located on the lot for only a temporary period. After the waterway was constructed they removed the filling station in pursuance of that understanding. Prior to the building of the waterway, there was a sales room and garage just east of this lot; then came a vacant lot and east of that was a three-story retail mercantile building. On the south side of the street there was an automobile sales room and garage and east of that a three-story brick and stone building. When Kexel and Skrinar bought the property they obtained a loan on it of \$10,000.00 and in 1928 made a new mortgage for \$12,500.00, which is still unpaid.

On August 8, 1931 Skrinar and his wife conveyed their undivided interest in the premises to the Joliet National Bank, apparently as security for a loan. On February 10, 1932 the Joliet National Bank was taken over by the controller of the currency and a receiver was appointed. On December 13, 1932 the Skrinars were adjudged bankrupt and a trustee was appointed. John E. Barr and the First National Bank of Joliet became the holders of the notes secured by the mortgage of \$12,500.00 on the premises in question and at the March term of the Circuit Court of Will County in 1933, John B. Anderson was appointed for the purpose of prosecut-

ing this claim for damages. The order of his appointment contains this wording, "To prosecute a claim against the State of Illinois because of damages done to the property herein described, by the State of Illinois in the construction of the Illinois Waterway and particularly the Cass Street Bridge and its approaches;" also the following—"Pending the action by the receiver all parties are enjoined from prosecuting any claim against the State on account of any damages to said real estate because of the construction of the Illinois Waterway. The distribution of any recovery by said receiver and the priority rights of the several interested parties therein are reserved for further determination by the Circuit Court of Will County."

Thereafter the First National Bank also went into the hands of the receiver. Efforts for a settlement having failed, John B. Anderson as receiver filed this claim April 30, 1937 for resulting damages to property not taken. The claim recites that for many years the Desplaines River and the I. & M. Canal had been crossed at Cass Street by a public bridge extending east and west at grade; that under Section 20 of the Illinois Waterway Act if existing bridges were damaged or materially impaired, the Department of Public Works and Buildings should repair or reconstruct such public bridges and approaches; that commencing about May 15, 1932 and continuing until about December, 1932, the State of Illinois by and through the Department of Purchases and Construction, which at that time had the duties of the Department of Public Works and Buildings, constructed a new bridge across the Illinois Waterway on Cass Street; that to provide a clearance of sixteen and one-half ($16\frac{1}{2}$) feet the new bridge was constructed twenty (20) feet higher than the bridge previously in existence; that it became necessary as a result for the State to build approaches to the bridge; that the street and sidewalk in front of the property herein described had previously been level and at grade with the lot; that by building the bridge and east approach thereto, the grade had been raised in front of petitioner's property a distance of seven (7) feet at the east end and twenty (20) feet at the west end, resulting in a seven (7) per cent descending grade past claimant's property; that as a result ingress and egress to this property has been materially interfered with and said premises caused to be of little value. Claimant contends that in

mediately prior to the construction of the present grade of the Cass Street approach, these premises were of the value of \$50,000.00; that the fair cash market value thereafter was \$9,000.00, and that the loss or damage sustained by claimant by reason of the construction is \$41,000.00.

The complaint further recites that by an Act of the legislature approved July 6, 1935 the Act providing for the Department of Public Works and Buildings adjusting such claims was repealed, and claimant was informed that he would have to seek his relief in the Court of Claims. The claim further recites that the *Illinois Waterway Act* provides, under *Sec. 23* thereof that—

"The State shall be liable for all damages to real estate within a radius of the Illinois Waterway, which should be overflowed or otherwise damaged by reason of the construction, maintenance or operation of the Illinois Waterway and its appurtenances."

On July 1, 1935 Section 24 of the Waterway Act providing for the settlement of waterway claims by the department was repealed by the passage of House Bill No. 933.

On May 8, 1939 an amendment was filed to the claim by leave of court first had and obtained, in any by which claimant represents that the damages to the property heretofore described arose out of the construction of the east approach to the Cass Street bridge, and that prior to and subsequent to the construction of said approach and of the reconstruction of the Cass Street bridge, said street was a part of Illinois S. B. I. Route No. 22, and that the reconstruction of said bridge and of the approach thereto was for the purpose of carrying said Route No. 22 over the Illinois Deep Waterway, and was a part of the construction by the State of Illinois of a State-wide system of durable hard-surface roads upon the public highways of the State. Thus we find that while claimant originally predicated his claim upon the theory that said bridge and approach were a part of the Illinois Waterway construction project, he now contends in the amendment to his claim that the damages resulted from the construction of a part of the hard road improvement program.

A stipulation has been filed, stating that the bridge in question was constructed under the direction and supervision of the Department of Purchases and Construction; that prior to July, 1933 various conferences were had between claimant's representatives and the director of said department and there-

after with the director of the Department of Public Works and Buildings; also that more funds remained unexpended in the Illinois Waterway Special Fund prior to, during and after the completion of the bridge in question, than the amount necessary to pay for the construction of such bridge and its approach and of any damage that might arise out of same.

The Attorney General concedes in his argument that since the repeal of Section 24 of the Illinois Waterway Act in 1935 there can be no doubt that the Court of Claims has exclusive jurisdiction of a claim for damages resulting from the construction of the Illinois Waterway. The Attorney General as counsel for respondent submits three main points to be considered, i. e.:

1. The basis of recovery.
2. From what fund the damages, if any, are payable.
3. The right of the legislature to appropriate for the payment of such damages.

The Attorney General also submits that the measure of damages is the difference in the fair cash market value of the property not affected by the improvement and its fair cash market value as affected by it. He further limits this rule, that such decrease in valuation must be such as is attributable to the construction. Counsel for claimant agrees to the above rule, but respective counsel differ widely as to the weight and materiality of testimony by various witnesses as to the valuation of the property, both before and after the construction of the bridge approach. Claimant introduced evidence by a number of witnesses, both as to the value of the premises, and as to the undesirability of same in the operation of a business if there is a grade of seven (7) per cent running by the premises. Mr. Kexel, being one of the parties in interest for whom the claimant sues, testified that he has no personal knowledge of any sales with which to make comparison relative to the fair cash market value of this property; that in his opinion the fair cash market value in 1925 and in 1932 would be approximately the same; that according to the loan values in 1925 the value of the property was between \$20,000.00 and \$25,000.00. This witness further testified that the possibilities of value of the property immediately prior to the construction varied on account of the uncertainty of the grade that would be established on the street; also that

after 1932 the general economic conditions might have affected the salability of the property; further, that immediately before the construction of the bridge he would not have been willing to pay \$20,000.00 for it with the uncertainty of the grade to be considered; that in 1928 he and Mr. Skrinar had one offer of \$25,000.00 and one of \$32,000.00, but that both of these were declined.

Mr. Stanley Munroe of the real estate firm of Munroe Brothers, of Joliet, a witness for claimant, fixed the valuation of the property prior to the construction of the approach at \$18,000.00 and the value thereafter at \$4,000.00.

Mr. Frank P. Lumley, associated with the Oliver Realty Company, called as a witness for claimant, concurred in these figures. This witness made a comparative study of the premises with properties on Wacker Drive in Chicago and visualized the possible improvements from a study thereof.

Mr. James E. Farrell, a witness for claimant, testified that he was the general manager of one of the larger department stores in Joliet; that while he was familiar with the fact that the Desplaines River carries sewage from the City of Chicago and vicinity, that he had never noticed any particular odor off the Desplaines River, and that except for the seven (7) per cent grade the property in question would be desirable for retail merchandising purposes.

Mr. Charles Graham, another witness for claimant, testified that he had handled the real estate and mortgage department for the Illinois Securities Company for ten years and that he had collaborated with the witnesses Munroe and Lumley to determine the valuation of the property in question. He concurred in their conclusion as to a value of \$18,000.00 before the improvement and of \$4,000.00 thereafter. He testified that he and the other witnesses visited the property together and discussed the values; that they were reasonably close together and agreed on the figures given. This witness testified that there has been a lot of optimism up to 1933 about the future of Cass Street property; that this enthusiasm resulted from the erection of a number of new buildings in 1928 and 1929, but that he does not recall any new buildings along either side of the Desplaines River within a distance of two hundred fifty feet from the edge of the river during the last six years. He further testified that in his opinion the location in question will never be particularly desirable with

the grade as it now exists and in such close proximity to the drainage canal; that irrespective of the grade the proximity of the property to the canal and the possibilities of the latter continuing to be used as it is make him believe that the people of Joliet have been very optimistic about Cass Street values.

The respondent introduced two witnesses on valuation, George R. Hill who has been exclusively engaged in the real estate business for thirty-five years in Joliet and Will County and Charles A. Noble who has been engaged in the real estate business for forty years in Joliet and Will County. All of the witnesses who have testified as to valuation have apparently had considerable experience and it is somewhat difficult to reconcile the wide difference in values as determined by them. Respondent's witness Mr. Hill placed the fair cash market value of the property for the highest and best use for which it was available, immediately prior to the construction of the bridge, at \$5,000.00, and he fixed the valuation subsequent to the completion of the bridge at \$3,500.00, or a decrease of \$1,500.00. This witness has known the property for fifty-three years and was daily employed for sixteen years by a lumber firm at the corner of Cass and Desplaines immediately east of the bridge in question. He testified that the stream over which the bridge is built was formerly known as the Sanitary Canal; that when the Sanitary District Canal was constructed a concrete wall was built along its banks; that a number of years ago this wall was taken out, the channel was widened and it was thereafter known as the Sanitary District and Illinois Waterway; that at other times it has been known as the Desplaines River and as a part of the I. & M. Canal. This witness also testified that the property immediately adjoining the one in question had been sold prior to the building of the new bridge to Voight Brothers for a garage, and that they paid \$3,900.00 for that lot which measured 66' x 150'. Mr. Hill further testified that he had measured the distance from the level of the ground at the front of the lot in question to the top of the approach to determine how high the approach is above such property; that he found by actual measurement that at the east end of the property the approach is three feet above the surface; that at the west end about eight or nine feet above the level of the property.

The other witness, Mr. Noble, fixed the valuation of the property prior to the construction at \$4,500.00 and after the construction at \$1,500.00. An appraisal made by or for the Division of Waterways, as shown by the latter's report filed herein on May 13, 1939 shows a valuation appraisal by a Mr. Briggs in 1930 at \$18,500 and another appraisal by a Mr. Mills in 1932 at \$11,100.00. The latter appraiser fixed the value of the premises after the improvement at \$9,146.40, and upon the basis of these figures the State at that time offered \$2,000.00 in full settlement of the claim, but this offer was declined.

The court has carefully studied the testimony of the several witnesses as to values and the facts upon which these opinions of value rest. The members of the court have also made a recent inspection of the property and of its surroundings. We had previously had occasion to consider the valuation of property in this immediate vicinity, and of the damage resulting thereto from a construction of this improvement, in the cases of *Fred Grassle vs. State*, 8 C. C. R. 150 and the cases of *Stein, et al.*, 8 C. C. R. 251. In all of these former cases some of the same witnesses appeared and claimants were represented by the same counsel. In the claim filed in the Stein matter it was represented that in 1932 the State of Illinois was engaged in the construction of the Illinois Waterway through the City of Joliet, following in general the bed of the Desplaines River and the I. & M. Canal; that for a longer time than anyone living recalls, the river and canal were crossed by a public bridge at grade extending from east to west on Cass Street. In those cases claimants, by counsel, and the Department of Public Works and Buildings, stipulated that their claims should be submitted to the Court of Claims for determination and that an award, if any should be made, should be paid by the Department of Public Works and Buildings as a waterway claim, and not by appropriations by the legislature for the payment of awards by the Court of Claims as in other cases. The Grassle case was decided in September, 1934. In our recent inspection of the premises we have been able to view the apparent effect of the Cass Street bridge construction upon the Grassle property since 1934 when the claim for damages thereto was awarded. From a consideration of all the evidence and from its inspection of the premises for which damages are sought, the court is of

the opinion that the difference in market value of the property before and after completion of the said Cass Street bridge and its approach is not in excess of \$4,500.00, and that if an award is made for such sum the owners of said premises will be justly and fully compensated for the damages they have sustained.

We further believe, upon the second question suggested by the Attorney General, that the award should be payable as damages incurred in the course of the construction of the Illinois Waterway. In the amendment to the complaint herein filed, counsel submits that the construction of the Cass Street bridge and the approach thereto were made as a part of Illinois S. B. I. Route No. 22 and that such construction was for the purpose of carrying said route over the Illinois Deep Waterway and was a part of the construction, by the State, of a state-wide system of durable hard-surfaced roads upon the public highways of Illinois; further, if there is an insufficient amount of money in the Illinois Waterway Fund out of which to pay any award entered herein, that such award might be paid by an appropriation from funds available for highway construction. This position is a distinct departure from the averments contained in the original complaint, wherein claimants described and referred to said bridge and its approach as a part of the construction of the Illinois Waterway. The latter position was in accord with the position previously taken by counsel for claimant in the *Grassle*, *Stein* and other cases above referred to. The claim recites and the evidence shows, that there was a bridge across the river and the I. & M. Canal at Cass Street from the time of memory of living men, and that Cass Street was a part of said Route No. 22, and that the traffic over such route passed over and across the canal by means of the then existing bridge. Counsel for claimant cites that provision of our statutes which reads—

"If in the construction of the 'Illinois Waterway' present bridges are damaged or materially impaired, the Department of Purchases and Construction shall repair or reconstruct present public bridges and approaches."
* * * (*Ill. Rev. Statutes, 1937, Ch. 19, Sec. 98.*)"

There is nothing in the record indicating that the Cass Street bridge was unusable because of age, or of insufficient strength to bear the loads imposed by traffic or that it was of insufficient width or clearance to permit the use thereof for

traffic. So far as the demand for highway purposes are concerned there is nothing in the record that indicates there was a need for the reconstruction of said bridge or the building of an inclined approach thereto. It does appear however, that the canal was at the time in question being reconstructed as a part of the Illinois Deep Waterway Project, and that as a part of such program it was deemed necessary to elevate the Cass Street bridge to aid in carrying out the purposes of the Deep Waterway.

Counsel for claimant have questioned the consistency of the Attorney General's position in opinions given by the latter's office in regard to this question. He refers to the Attorney General's opinions of 1930 at page 603, wherein it is stated that bridges over the Illinois Deep Waterway on S. B. L. routes can be built out of Road Funds. The Assistant Attorney General appearing for respondent cites the opinion of the Attorney General in opinions of 1929 at page 255:

"In answer to your second question, will say that if the reconstruction or replacement of existing bridges which are now adequate and serviceable for highway purposes is made necessary by the building of the waterway, then in my opinion the cost of such reconstruction would properly be chargeable to deep waterway construction and would have to be paid out of the waterway fund, and that in view of the provisions of the canal section of the Constitution, the General Assembly is without authority to make additional appropriations for the reconstruction of such bridges."

We believe the distinction as set out in the latter opinion is material in the present case, i. e. where it appears that the reconstruction or replacement of the bridge is shown to be for and in connection with the building or the improvement of the waterway, the building is chargeable to the Waterway Fund, and in view of the provision of *Section 1 of Article 14* of the *Constitution* of Illinois, the only funds that can legitimately be used in such improvement are those derived from the \$20,000,000.00 bond limit or the surplus earnings of the waterway, and the legislature cannot make valid appropriations of other funds from the State Treasury therefor.

The province of the Court of Claims is to determine the propriety and amount of an award, if any, in a given case. The making of an appropriation therefor, and the payment thereof, are not matters in which this court presumes to dictate. It is necessary however, that in recommending an award to the legislature for its favorable action, we should indicate our opinion as to the validity of such appropriations, if made.

We believe that the award herein made would be validly payable out of any funds available for the building, enlargement, maintenance or extension of the I. & M. Canal or of the Illinois Deep Waterway. An award is therefore hereby made in favor of claimant in the sum of \$4,500.00, payable from such funds as may be available for the payment of claims and demands growing out of the construction or maintenance of the I. & M. Canal or the Illinois Deep Waterway.

(No. 3021—Claim denied.)

W. J. MUMM, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 13, 1939.

GLEN E. CHAPMAN, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*not applicable to all employees of State*
The Workmen's Compensation Act does not automatically apply to all employees of State, but only when they are engaged as such, in an employment, in a department of the State which is, at the time of the accident, for which compensation is claimed, engaged in some one or more of the enterprises or businesses which are enumerated in the Act as extra hazardous.

SAME—*same—associate instructor in plant breeding, etc., University of Illinois—when employment not extra hazardous within Section 3 of Act.* Where the only evidence in support of claim for compensation, is that claimant, an associate instructor in plant breeding, etc., in the College of Agriculture of the University of Illinois was injured while husking corn by hand on experimental farm of State, it is not shown that claimant was at the time of the injury, actually engaged in an occupation declared to be extra hazardous or that State was engaged in any enterprise or business designated as extra hazardous in Section 3 of Act, and he is not entitled to compensation under Act.

SAME—*same—farm work excepted from—husking corn on experimental farm is.* Where associate instructor in College of Agriculture of University of Illinois was husking corn by hand on experimental farm of State, he was engaged in farm work, and no compensation can be awarded for an injury sustained while so engaged, farm work being specifically excepted in Act.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

For some time prior to, and on December 4th, 1935, the claimant, W. J. Mumm, was in the employ of the respondent as an associate in plant breeding in the Agronomy Depart-

ment of the College of Agriculture of the University of Illinois, at a salary of \$195.83 per month.

Claimant was employed to give class instruction, to do corn breeding work, and experiment work on corn variety test plots. On the date last mentioned, while in the performance of his duties, claimant was husking corn by hand at the DeKalb Experimental Field, which is operated for experimental and educational purposes by the University of Illinois, one mile south of the City of DeKalb. In the course of such work, an ear of corn was thrown in such manner as to strike him in the left eye, breaking one lens in the spectacles he was wearing, thereby causing pieces of glass to become embedded in the eye and penetrate the eyeball so deeply as to cause the fluid to be drained therefrom. He was immediately taken to the DeKalb Public Hospital where he was examined and given first-aid treatment. Thereafter he was treated by several eye specialists, and treatments of the eye were continued to and including the month of December, 1936.

Claimant incurred bills for medical services and hospitalization in the amount of \$701.58, of which amount \$42.00 was paid by the University of Illinois Hospital Association, of which claimant was a member, \$130.23 was paid by claimant, and the balance of \$529.35 remains unpaid.

Notice of the accident was given, and claim for compensation on account thereof was made within the time required by Section 24 of the Compensation Act.

It is admitted that the accident in question resulted in the permanent injury of claimant's left eye, and from all of the evidence in the record, it appears that he has sustained the permanent loss of fifty per cent (50%) of the sight of such eye, for which he claims compensation under the terms and provisions of the Workmen's Compensation Act of this State.

For a proper determination of the questions involved, it will be necessary to consider briefly the pertinent provisions of the Workmen's Compensation Act.

Section 3 of the Act defines the application thereof, and provides as follows:

"The provisions of this Act hereinafter following shall apply automatically and without election to the State, county, city, town * * * and to all employers and all their employees engaged in any department of the following enterprises or businesses which are declared to be extra-hazardous

namely:—" (then follows a list of ten specified enterprises or businesses which are declared by the Act to be extra-hazardous).

Section 4 defines the term "employer" as used in the Act, and provides as follows:

"The term 'employer' as used in this Act shall be construed to be:—

First—The State and each county, city, town, township * * * therein

Second—Every person, firm, public or private corporation * * * engaged in any of the enterprises or businesses enumerated in Section 3 of this Act. * * *

Section 5 defines the term "employee" as used in the Act, and provides as follows:

"The term 'employee' as used in this Act, shall be construed to mean:

First—Every person in the service of the State, including all persons in the service of the University of Illinois on and after January 25, 1933, except members of the instructional, research and administrative staffs thereof, when not, at the time of the injury, actually engaged in an occupation declared to be extra-hazardous in Section three (3) of this Act, county, city, town, township," etc.

Prior to 1935, Section 5 of the Act read as follows:

"The term 'employee' as used in this Act, shall be construed to mean:

First—Every person in the service of the State, county, city, town, township," etc., etc.

In 1935 said section was amended to read as first above set forth, that is to say, there was inserted therein the words, "including all persons in the service of the University of Illinois on or after January 25, 1933, except members of the instructional, research and administrative staffs thereof when not, at the time of the injury, actually engaged in an occupation declared to be extra-hazardous in Section Three (3) of this Act."

Prior to such amendment, every person in the service of the University of Illinois (being a person in the service of the State) was an employee within the meaning of such section; since the amendment, members of the instructional, research and administrative staffs are employees, within the meaning of such section, only if, at the time an injury is sustained, they are engaged in an occupation declared to be extra-hazardous in Section 3 of the Act.

Although Section 3 specifically provides that the Act shall apply automatically and without election to the State, county, city, * * * incorporated village, and to all employers engaged in any department of the several enterprises or businesses therein designated as extra-hazardous; and

although the State, and each county, city, * * * and incorporated village is specifically designated in Section 4 as an employer; and although every person in the service of the State, county, city, * * * incorporated village, is specifically designated in Section 5 as an "Employee;"—still the Supreme Court, in the case of *Village of Chapin vs. Industrial Commission*, 336 Ill. 461, held that the Act did not apply automatically to such Village. In that case the employee was injured while engaged in hauling dirt, to fill up holes in the streets. The only question in the case was whether the Village automatically came under the Act by virtue of Section 3 thereof. If so, the employee was entitled to compensation; if not, he was not entitled to compensation unless he could prove that the Village was engaged in some enterprise or business declared to be extra-hazardous by said Section 3.

In that case the court, after a careful consideration of the Compensation Act, and the several amendments thereto since the original Act was adopted, came to the conclusion that the provisions of the Act did not apply automatically to all cities and villages; and that in order that the municipal corporations mentioned in Sections 4 and 5 of the Act be bound thereby, it is necessary to show that such municipal corporations are engaged in some one of the enterprises or businesses which are enumerated in Section 3 of the Act as extra-hazardous. The law as stated in the *Village of Chapin* case was approved in the case of *Forest Preserve District vs. Ind. Com.*, 357 Ill. 389, where the court said:

"Where a municipal corporation does not engage in any enterprise or business or carry on any endeavors which include those activities declared by Section 3 of the Act to be extra-hazardous, the corporation does not come automatically under the provisions of the Act. The record must show affirmatively that the municipality was engaged in some one of the extra-hazardous enterprises or businesses enumerated."

So, in this case, the claimant must prove not only that he is an employee within the meaning of Section 5, but must also show that the respondent is engaged in an enterprise or business declared to be extra-hazardous by said Section 3.

Counsel for claimant, on page 2 of their Statement, Brief and Argument, admit that claimant probably would be classed as a Member of the Instructional or Research Staff or probably both instruction and research.

There is nothing in the record to indicate the claimant at the time of the injury was actually engaged in an occupation declared to be extra-hazardous in Section 3 of the Act, and consequently there is nothing to show that claimant was an "employee" within the meaning of Section 5 as amended, at the time of his injury; nor is there any evidence in the record to prove that the respondent is engaged in any enterprise or business designated as extra-hazardous in Section 3 of the Act.

Counsel for claimant contend that even though claimant was a member of the instructional staff, yet at the time of the accident he was doing the work of a laborer; that if a laborer was injured under similar circumstances, he would be entitled to compensation; and that therefore claimant should have the same right. Such, however, is not the law. Claimant bases his right of recovery on the Workmen's Compensation Act, and must bring himself within the provisions of the Act in order to be entitled to an award. The books are full of cases where there are similar inconsistencies, but such results always follow the application of general laws to particular cases.

Furthermore, if a laborer were injured while doing work similar to that in which claimant was engaged at the time of his injury, he would not be entitled to compensation under the Act.

The proviso of Paragraph 8 of Section 3 of the Compensation Act states that "nothing contained herein shall be construed to apply to any work, employment or operations done, had or conducted by farmers and others engaged in farming, tillage of the soil, or stock raising, or to those who rent, demise or lease land for any of such purposes, or to anyone in their employ, or to any work done on a farm or country place, no matter what kind of work or service is being done or rendered."

The question as to the proper construction of this proviso was before our Supreme Court in two cases, to wit: *Hill vs. Ind. Com.*, 346 Ill. 392, and *Noverio vs. Ind. Com.*, 348 Ill. 137.

In the Hill case, the employee was working for a farmer by the name of Weber who bought a threshing machine and engaged in threshing grain for his neighbors as well as himself, and afterwards attached a clover-hulling device to the separator and agreed to hull clover for some of his neighbors.

Hill assisted in running the threshing machine and operated the separator while hulling clover. While engaged in such work on the farm of a neighbor, Hill was kicked by a horse and sustained injuries for which he claimed compensation. The employer contended that the work in which they were then engaged was work on a farm within the meaning of the above proviso, and that the injuries sustained by the claimant therefore were not compensable.

In considering such contention the court, on page 396, said:

"By the usual rule of construction the words 'any work done on a farm or country place' must be limited by the context of the Act to mean work which is in its nature a part of farming. It cannot be said that plaintiff in error, while hulling clover for another for hire, was a farmer engaged in farming, tillage of the soil, or stock raising, renting, demising or leasing land for any such purpose on his own behalf, and if this were the extent of the exemption we would be constrained to agree with the contention of defendant in error that the operations here were under the Act. The exemption, however, goes further and applies to any work done on a farm or country place, no matter what kind of work is being done or rendered. Even limiting this language to work which is in its nature farm work, it is apparent that the legislature intended to exclude from the operation of the Act not only the employer and employee who are engaged in general farming operations for such employer but who are doing any farm work on a farm or country place."

In the Noverio case, Noverio undertook a patch tile job on a farm, and was struck in the eye by a piece of metal while he was working at the home of his employer at some considerable distance from the farm in question, making screens to cover the tile outlet.

It was contended on the part of the employee that he was under the Compensation Act by reason of the fact that sharp-edged cutting tools were used in the doing of the work. The employer took the position that the work being done was "work on a farm," within the aforementioned proviso. In disposing of the question there raised, the court, on page 139, said:

"Without regard to the question as to whether Corsini's business could be held to involve excavating or the use of sharp-edged cutting tools within the contemplation of the statute, it clearly was in its nature farm work. No work could be more fundamentally a part of farming than drainage to put the soil in shape for cultivation. That it was being done by one not engaged in general farming himself is immaterial. It is true that the portion of the operation in which the injury actually occurred does not appear to have been performed within the physical boundaries of the particular farm

for which the tiling was being done, nor is it definitely shown to have been done on soil in the nature of a farm or country place as distinguished from other types of realty. Such, however, is not here a material consideration. The adjournment to Corsini's basement was obviously to facilitate the completion of an integral part of the drainage system that was in process of installation on the farm and the character of the work was in no sense altered thereby."

The only facts in the record relative to the work being done by claimant at the time of his injury are, in substance, that he was "husking corn by hand at the DeKalb Experimental Field which is operated for experimental and educational purposes by the University of Illinois." As we view the matter, that constitutes work on a farm, within the meaning of the proviso in Paragraph 8 of Section 3 of the Act.

The suggestion is made that claimant is entitled to an award on the grounds of equity and good conscience. Similar contentions have heretofore been made in numerous other cases before this court, but it is now well settled that the Court of Claims Act of this State merely provides a forum in which claims against the State may be heard; that such Act does not create any new liability against the State, or increase or enlarge any existing liability; that the authority of this court to allow awards is limited to claims in which the claimant would be entitled to redress against the State, either at law or in equity, if the State were suable; that unless the claimant can bring himself within the provisions of a law giving him the right to an award, he cannot invoke the doctrine of equity and good conscience to secure such award. *Crabtree vs. State*, 7 C. C. R. 207; *Titone vs. State*, 9 C. C. R. 389; *Garbutt vs. State*, decided at the September Term, 1937; *Bishop vs. State*, decided at the November Term, 1938.

This case appeals very strongly to the sympathies of the court, but we do not make the law and can only interpret it as we find it. This court has only such jurisdiction as is conferred by legislative enactment, and much as we would like to enter an award herein, we have no authority to do so under existing laws and the record before us.

Award must therefore be denied and the case dismissed.

(No. 2911—Claim denied.)

ANDREW BASNYK, Claimant, vs. STATE OF ILLINOIS, Respondent

Opinion filed June 13, 1939.

GARIEPY & GARIEPY, for claimant.

JOHN F. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—making claim for and filing application for compensation within time fixed in Section 23 of, condition precedent to jurisdiction of court. Where no compensation has been paid under Act, and no claim made for, nor application filed for same, within time fixed in Section 24 of Act, court is without jurisdiction to proceed with hearing on claim filed thereafter.

MR. JUSTICE LANSFORD delivered the opinion of the court:

On June 4, 1936, claimant filed his complaint alleging that on October 23, 1935, he was injured by reason of an accident arising out of and in the course of his employment while working in the kitchen of one of the shelters operated by the Illinois Emergency Relief Commission at 115th and Michigan Avenue, Chicago, Illinois, and avers that at that time he was employed by the Illinois Emergency Relief washing dishes; that he accidentally scratched his left hand on a tin plate, and that an infection set in which later developed into blood poisoning and resulted in a complete loss of use of the left hand; that medical and surgical treatment were furnished by the Illinois Emergency Relief Commission, and that his claim is for \$7.50 per week temporary compensation during the time he was treated and convalescing from the effects of the injury and for \$7.50 per week for 135 weeks for loss of use of the left hand. He alleges that he had no children dependent on him for support and that immediate notice of the accident was given to his superiors. This complaint was sworn to on the 2nd day of June, 1936.

Claimant filed an amended petition wherein it is averred that on January 23, 1935, he was injured by reason of an accident arising out of and in the course of his employment while working in the kitchen of one of the shelters operated by the Illinois Emergency Relief Commission at 11526 South Michigan Avenue, Chicago, Illinois, and he avers that on the latter date, he accidentally scratched his left hand on a tin plate; that an infection set in which later developed into blood poisoning and resulted in a complete loss of use of the left hand; that medical and surgical treatment were furnished by the Illinois Emergency Relief Commission. Claimant made the same claim for compensation as he made in his original

complaint and this complaint was sworn to on the 25th day of May, 1937.

Counsel for the State filed a motion to dismiss on the grounds that neither the original complaint nor the amended complaint show that claim was made within one year after January 23, 1935, the date of his alleged injury.

Counsel for claimant did not file a brief.

This claim must be denied for the reason that this court has no jurisdiction and for the reason that no award can be made to a state employee for injuries arising out of and sustained in the course of his employment unless the claimant filed his claim with the clerk of this court within one year after the date of the alleged injury.

See Section 24 of the Illinois Workmen's Compensation Act:

Quillman vs. State, 8 C. C. R.;

Lay vs. State, 8 C. C. R. 34;

Crabtree vs. State, 7 C. C. R. 207.

Claim will, therefore, be denied.

(No. 5248—Claimant awarded \$1,442.10.)

JOHN BERG, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 10, 1939.

Rehearing denied June 13, 1939.

HINSHAW & CULBERTSON, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MUNT, Assistant Attorney General, for respondent.

ILLINOIS NATIONAL GUARD—*member of—illness tractable to diphtheria—no award for financial assistance may be made.* Where member of Illinois National Guard, in the performance of his duty as such, was obliged to submit to vaccination and thereafter became seriously ill, resulting in loss of work, diminution of earnings, and incurring of expense for medical and hospital care, and the weight of the evidence shows that said illness is toxic poisoning, due to vaccine germs administered in said vaccination, an award for financial assistance is justified under the provisions of the Military and Naval Code.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant, John Berg, seeks an award of Twenty-five Thousand (\$25,000.00) Dollars for loss of time, medical and hospital expenses and permanent disability alleged to have

resulted from an illness caused by vaccination of claimant as a member of the Illinois National Guard. Claimant enlisted in March, 1937 in Company B, 108th Combat Engineers. He was twenty years of age, unmarried and employed as addressograph operator at the Commonwealth Edison Company of Chicago, at a salary of Seventy-five (\$75.00) Dollars per month. On June 8, 1937 claimant in company with other members of his company, underwent the required vaccination for smallpox, and also received the first injection of typhoid serum, preparatory to engaging in summer military maneuvers with his company at Camp Grant. On July 16, 1937 he noticed pains in the calves of his legs. On July 19, 1937 he was unable to go to work and was hospitalized at the Michael Reese Hospital in Chicago from July 22nd to July 28th, 1937. Dr. Chaloupka, a witness called by claimant, testified that he had known claimant for many years; that prior to July, 1937 he was in normal condition; that he was called to attend claimant at that time and found he had pain and weakness in the legs, arms and hands and that this condition progressively increased. There was no evidence in the beginning of temperature, sore throat or infection, no nausea and no evidence of gastro-intestinal trouble; that the absence of these symptoms definitely ruled out any diagnosis of polio-myelitis; that the patient's condition gradually became worse and he became weaker; that he had a perfectly normal blood count and that a spinal puncture showed negative with no albumin, no globulin and no increased cell count. A diagnosis of toxic paralysis produced by vaccination was reached by Dr. Chaloupka, in conference with Dr. Theodore Stone, the latter being connected with Passavant Hospital. Dr. Stone testified that after making a complete neurological examination of the patient he found that the latter had a paralysis of both arms and both legs with a bilateral foot drop. The patient spent about two and one-half (2½) months in bed receiving various types of treatment for his paralyzed condition. Late in the winter he was able to get out of bed but could not walk without help and was placed in a wheelchair. After about six weeks in the wheelchair that is in November, 1937 he began to walk with the aid of crutches. He was then given braces at the Michael Reese Hospital and was able to again resume part-time work on or about January 24, 1938. About March,

1938 he returned to full-time work, continuing to wear the braces until approximately the 11th of November, 1938. At the time of the hearing on November 19, 1938 the claimant could walk by himself without braces, but only in a slow walk and could not lift the left foot more than an inch or so causing the heel of the left foot to strike the ground prematurely, by reason of what the doctor characterized as foot drop.

Up to February 12, 1938 claimant had incurred Six Hundred Ninety-five (\$695.00) Dollars expenses for hospital, medical, nurses, braces, wheelchair and other incidents of his illness. This expense has all been paid or assumed by claimant and his father and none of it has been paid by the State. Part of the nurses' expense was paid by some agency unknown to claimant. He first returned to work January 24, 1938 and at the time of the hearing was receiving the same wages that he had received prior to his disability. Dr. Stone testified that patient's condition at the time of the taking of evidence might have a causal relationship with the vaccination and the conditions of July 28, 1937. He was quite positive that claimant's condition was not polio-myelitis. Dr. Stone further stated that in his opinion patient's condition as disclosed at the time of the hearing was not permanent and that this type of patient usually makes a complete recovery, as the toxins causing the condition eventually become assimilated and disappear.

A Board of Medical Officers was convened for the purpose of making an examination relative to Private Berg's disability, and to pass on the surgical and medical treatments rendered and the pay of the soldier during the period of his incapacity. The board was also directed to make recommendations relative to the necessity for medical treatment, hospitalization and payment of bills. The board met and questioned Private Berg who was accompanied by his attorney and the attending physician, Dr. Chaloupka. A complete neurological examination was also conducted by Dr. Alex S. Hershfield in the presence of the board. The Medical Board's report found that Private Berg had a physical disability, i. e. a motor involvement of both lower extremities below the knees; that he is required to wear braces from the knees down; that the difficulty at the time of said findings is the result of an attack of

acute anterior polio-myelitis; that no other factor except the infection that produces polio-myelitis is responsible for patient's condition. Thereupon the board made the following recommendation:

"In view of the belief of the Board that the present disability of Private John Berg, presents the permanent residues of an anterior polio-myelitis, which is in no way incident to or caused by the inoculation or vaccination rendered on June 8, 1937, the Board is unable to make any recommendations for further treatment, hospitalization, payment of bills for such services and pay of the soldier."

Attached to the report of the Medical Board is a report by Dr. Alex S. Hershfield in which he states that the patient's condition is due to an attack of acute anterior polio-myelitis, and that in his belief no other factor except the infection that produces polio-myelitis was in any way responsible for the patient's condition.

A motion to strike the adjutant's report was denied by the court on October 11, 1938.

While the evidence is conflicting, the greater weight thereof supports a finding that the claimant did not have anterior polio-myelitis, and that such evidence supports the diagnosis of toxic poisoning due to vaccine serum. The Attorney General in his Statement, Brief and Argument, filed herein on March 7, 1939, concedes, in fairness to the claimant, that although it does not appear as a part of the record in this case, the medical records herein filed were in fact examined by Dr. A. C. Baxter, Acting Director of the Department of Public Health, and the latter expressed the opinion that from the history of the case and from a consideration of the medical records, he concurs in the above finding.

The claimant, pursuant to an order of this court entered February 14, 1939, submitted himself to an examination by Dr. Sidney O. Levinson, Director, Samuel Deutsch Convalescent Serum Center, and Dr. Levinson is also of the opinion that the illness of the claimant was due to a reaction caused by his vaccination.

As it clearly appears that the vaccination to which claimant submitted was required of him as a member of the Illinois National Guard, and as the illness suffered by him is traceable to his military duty, his claim comes within the provisions of the *Illinois Military & Naval Code*, whereby this court is given jurisdiction to render financial assistance. Said section provides as follows:

"In every case where an officer or enlisted man of the National Guard or Naval Reserve shall be injured, wounded or killed while performing his duty as an officer or enlisted man in pursuance of orders from the Commander-in-Chief, said officer or enlisted man or his heirs or dependents, shall have a claim against the State for financial help or assistance, and the State Court of Claims shall act on and adjust the same as the merits of each case may demand." *Sec. 133* (Ch. 129 Ill. Rev. Statutes).

While the evidence supports an award for temporary disability, it is not sufficient upon which to base an award for permanent disability. In addition to other relief, claimant is entitled to reimbursement for the medical care and expense incurred by reason of his illness. Such medical care and expense amounts to Six Hundred Fifty-seven (\$657.00) Dollars. Claimant's average weekly wage would approximate Seventeen and 30/100 (\$17.30) Dollars in the employment wherein he was engaged both before his illness and subsequent thereto. He was compelled to quit work July 19, 1937 and was unable to go back to work until January 24, 1938. Thereafter for a period of approximately two months he lost two hours per day which resulted in a decrease of pay of approximately \$18.00 during the ensuing two months, after which time he went to work at full time. He has therefore apparently lost \$485.10 in wages as a result of his labor, and in the opinion of the court should receive an award for that amount.

An award is therefore hereby made in favor of claimant in reimbursement of the expense incurred and wages lost as the result of the illness suffered by him in line of duty, in the total sum of One Thousand One Hundred Forty-two and 10/100 (\$1,142.10) Dollars.

(No. 3173—Claim denied.)

HERMAN BISHOP AND KENNETH BISHOP, BY HERMAN BISHOP, His
NEXT FRIEND, Claimants, *vs.* STATE OF ILLINOIS, Respondent

Opinion filed November 16, 1938.

Rehearing denied June 13, 1939.

F. O. PARRISH and E. P. FIELD, for claimants.

OTTO KERNER, Attorney General; MURRAY F. MUNN, Assistant Attorney General, for respondent.

NEGLECT—employees of Division of Highways in construction repairing highway—governmental function—State not liable for. In the construction and maintenance of public highways the State exercises a govern

mental function, and the doctrine of respondent superior is not applicable to it, and it cannot be held liable for the negligence of its officers, servants or agents in connection therewith.

SAME—same—personal injury sustained as the result of—award for damages on grounds of equity and good conscience, regardless of degree of, cannot be made. It is well settled that, regardless of the merits of a claim for damages for personal injuries, or for loss of or damage to property, sustained as the result of the negligence of officers, servants or agents of the State, or the extent or seriousness of such injuries, loss or damage, or the degree of negligence of such officers, servants or agents, or the absence of contributory negligence, an award cannot be made for compensation for same on the grounds of equity and good conscience.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On December 30th, 1937 the claimants filed their complaint herein, and allege therein substantially as follows:

That on September 11th, 1936 three highway maintenance men in the employ of the Division of Highways, Department of Public Works and Buildings of the respondent, were engaged in constructing an expansion joint on S. B. I. Route 97 at a point three and one-half miles west of the Village of Roseville, in Warren County, known as Parrish's Corner. S. B. I. Route 97 is a concrete highway, and at that point extends in a northerly and southerly direction and is there intersected by a gravel road which extends in a northerly and southerly direction. Just before noon on the last mentioned date, a trench about six inches wide and nine or ten inches deep had been cut across the concrete slab and had been half-filled with hot liquid asphalt heated to 450 degrees or more. At noon the workmen stopped work, and proceeded to a point under a tree on the east side of the gravel road, about fifty (50) feet north and twelve (12) feet east of said trench or expansion joint, leaving the same without any guard or barricade, and without posting any notice of danger.

Also, that the claimant, Herman Bishop, is the father of the claimant, Kenneth Bishop; that the claimant, Kenneth Bishop, was then a minor of the age of seven (7) years, and resided with his parents some distance south of such concrete highway, on the east side of the aforementioned gravel road; that on the day in question, such minor was attending a school located a short distance north of said concrete highway, and on the west side of said gravel road; that it was customary for said minor at noon time to walk from said school to said

Parrish's Corner, where his father met him and took him home in an automobile.

Also, that at noon time on the date in question, said Kenneth Bishop, with four other children, traveled in a southerly direction along the east side of said gravel road, and passed the highway patrolman of the respondent who gave them no notice or warning of the hot asphalt in the trench or the danger connected therewith; that in crossing said concrete highway the claimant, Kenneth Bishop, stepped on and into the hot liquid asphalt in said expansion joint with his right foot, and thereby suffered severe burns, resulting in serious and permanent injuries.

Also, that the claimant Herman Bishop was then and there in the exercise of all due care and caution for the safety of said child, and had no notice or knowledge of the existence of said expansion joint; that the claimant, Kenneth Bishop, was not and could not be held guilty of contributory negligence; and that the aforementioned highway maintenance men were guilty of wilful, wanton and grossly negligent conduct which resulted in the injuries to the minor claimant.

The Attorney General has entered a motion to dismiss on the ground that the State is not liable for the negligence, or for the wilful and wanton misconduct of its employees engaged in the maintenance and repair of its highways.

This court has repeatedly held that in the repair and maintenance of its hard-surfaced highways, the State acts in a governmental capacity. *Wolfe vs. State*, No. 3215, decided May Term, 1938; *Spurrell vs. State*, No. 2228, decided September Term, 1937; *Tivnan vs. State*, 9 C. C. R. 495; *McGready vs. State*, 9 C. C. R. 63; *Baumgart vs. State*, 8 C. C. R. 220; *Bucholz vs. State*, 7 C. C. R. 241; *Braun vs. State*, 6 C. C. R. 104.

It is a rule of general application in this State that in the exercise of its governmental functions, the State is not liable for the negligence of its servants and agents in the absence of a statute making it so liable. *City of Chicago vs. Williams*, 182 Ill. 135; *Miner vs. State Board of Agriculture*, 259 Ill. 549; *Gebhardt vs. Village of LaGrange Park*, 354 Ill. 234.

Claimants recognize this general rule, but contend that they are entitled to an award on the grounds of equity and good conscience.

In the case of *Crabtree vs. State*, 7 C. C. R. 207, the question of the right of a claimant to recover on the grounds of equity and good conscience, was fully considered, and we there held, page 222, that:

Section four (4) of paragraph six (6) of the Court of Claims Act, which provides as follows, to-wit: The Court of Claims shall have power: "to hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, ex contractu and ex delicto, which the State as a sovereign commonwealth, should, in equity and good conscience, discharge and pay"; merely defines the jurisdiction of the court, and does not create a new liability against the State, nor increase or enlarge any existing liability; that the jurisdiction of this court is limited to claims in respect of which the claimant would be entitled to redress against the State either at law or in equity, if the State were suable; that this court has no authority to allow any claim unless there is a legal or equitable obligation on the part of the State to pay the same, however much the claim might appeal to the sympathies of the court; that unless the claimant can bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure such an award."

The decision in the *Crabtree* case has been adhered to and followed in numerous cases decided since that time.

Claimants are familiar with the rule as set forth in the *Crabtree* case, but say that since the decision in that case "the trend of social justice (equity and good conscience) has become far more pronounced each year," and that all questions involving social justice are now far more liberally considered than five years ago, and that each year there has been increased liberality shown and more advancement in all phases of this important question.

The question here involved, however, is not a question of social justice, but a question of legal right; a question as to whether the claimants would have a legal right to recover against the State if the State were suable. As above stated, the State in the exercise of its governmental functions, is not liable under the doctrine of respondeat superior, and therefore claimants could have no legal right of action against the State if it were suable, and, as stated in the *Crabtree* case, "unless the claimant can bring himself within the provisions of a law giving him the right to an award, he cannot invoke the provisions of equity and good conscience to secure such an award."

In support of their assertion that all questions involving social justice are now more liberally considered than they were a few years ago, claimants state: "The Legislature of

this State recently passed acts appropriating many thousands of dollars as a gratuity, to the widows of various judges who died before the expiration of their terms, each of whom received a handsome salary for his services," and suggest that such action was prompted solely by a sense of duty, and to do social justice to such widows.

Whatever may have been the motive which prompted the legislative action referred to, such action can have no effect on our decision in this case. We can only apply the law as enacted by the Legislature, and have no right to attempt to legislate by judicial decision. Should the Legislature enact legislation which will authorize us to allow an award in this case, we will be only too happy to make such award.

The claimants also maintain that a distinction should be made between cases involving negligence and cases involving wilful and wanton misconduct, and that in cases where damages result from the wilful and wanton misconduct of a servant or agent of the State, an award should be allowed. There are several cases in the Reports, in which an exception to the general rule was recognized in cases involving wilful and wanton misconduct, and in the case of *Cavender vs. State*, 7 C. C. R. 199, and *Miller vs. State*, 7 C. C. R. 129, in which the facts were similar to the case at bar, awards were allowed on the basis of such exception.

However, since the decisions in such cases, the question as to whether an exception to the general rule should be recognized in cases involving gross negligence or wilful and wanton misconduct, was squarely before the court in the following cases, to wit: *Garbutt vs. State*, No. 2246, decided September Term, 1937; *Durkiewicz vs. State*, No. 2484, decided September Term, 1937; *Stanley, Admr. vs. State*, No. 2697, decided November Term, 1937; and *Sale, Admr. vs. State*, No. 3258, decided September Term, 1938.

Upon a careful consideration of the question in the cases cited, we concluded that there was no basis for a distinction between cases involving ordinary negligence, and cases involving gross negligence or wilful and wanton misconduct, and in each of such cases we held that there was no liability on the part of the State; that liability, if any, was on the part of the negligent employee, and not upon the State. In the *Garbutt* case, *supra*, we said:

If the State is not liable for the ordinary negligence of its servants and agents, there is no principle of law under which it can be held liable for the gross or wanton negligence of such servants and agents, in the absence of a statute making it so liable. The purported exception has no basis in law, and is no longer recognized by this court."

This may seem a harsh rule in a case like this, which involves a permanent injury to a child of tender years, but we do not make the law and can only apply it as we find it, and if any change is to be made therein, it must come through the Legislature and not through the courts.

Under the law as above set forth we have no authority to allow an award, and the motion of the Attorney General must therefore be sustained.

Motion to dismiss allowed. Case dismissed.

SUPPLEMENTAL OPINION ON PETITION FOR REHEARING.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

This case again comes before the court on claimants' petition for rehearing.

The attention of the court is particularly directed to the case of *The People Ex Rel. McDavid vs. Barrett, Auditor, etc.*, 370 Ill. 478, also to a recent Act of the Legislature of this State entitled "An Act Concerning Damages Caused by Escaped Inmates of Charitable Institutions Over Which the State Has Control," Session Laws 1935, page 255.

The McDavid case and two other cases consolidated therewith, involved the constitutionality of appropriations made by the Legislature for the benefit of the widows of certain Circuit Judges. The question involved was whether the appropriations were made for a public purpose, or whether the same were made for a private purpose, in violation of Section 20 of Article 4 of the Constitution. After fully considering the matter, the Supreme Court said:

"Our conclusion is that the appropriations in controversy are of a public nature, enhancing the general welfare and are therefore valid."

There is nothing in that case which in any way affects the issues here involved. The only question involved in that case was the authority of the Legislature to make certain appropriations. The court held that the Legislature had such authority, and sustained the provisions of the Act. The jurisdiction of the Court of Claims or its right to enter an award

was not involved or considered. That the Legislature has the authority to make an appropriation to the claimant in this case, if it sees fit to do so, there can be no doubt. However, this court has only such jurisdiction as the Legislature has conferred upon it, and under existing statutes, as construed by this court, we have no authority to allow an award under the facts in this case.

The provisions of the aforementioned Act of the General Assembly relative to damages caused by escaped inmates of certain charitable institutions, are as follows:

"Whenever a claim is filed with the Department of Public Welfare for payment of damages to property, or for damages resulting from property being stolen, heretofore or hereafter caused by an inmate who has escaped from a charitable institution over which the State of Illinois has control while he was at liberty after his escape, the Department of Public Welfare shall conduct an investigation to determine the cause, nature and extent of the damages inflicted and if it be found after investigation that the damage was caused by one who had been an inmate of such institution and had escaped, the said department may recommend to the Court of Claims that an award be made to the injured party, and the Court of Claims shall have power to hear and determine such claims."

Such Act merely provides, under certain circumstances, for an investigation by the Department of Public Welfare. If it is found, as the result of such investigation, that damage has been caused by an escaped inmate of a State charitable institution, the Department may recommend to the Court of Claims that an award be made to the injured party, and the Court of Claims is given specific power to hear and determine such claims.

Such Act has no direct bearing on the question here involved. Inferentially, however, it is an argument against the claimant, as it must have been considered that in the absence of such legislation, the Court of Claims had no jurisdiction to act on such claims;—otherwise it would not have been necessary to provide therein that "the Court of Claims shall have power to hear and determine such claims."

The other matters set forth in the petition for rehearing were fully considered by the court on the original hearing. There is nothing in the petition for rehearing which causes us to change our views as expressed in the original opinion, and the petition for rehearing is therefore denied.

(No. 3345—Claim denied.)

LEITH F. EDWARD, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed April 11, 1939.
Rehearing denied June 14, 1939.

CHARLES M. HAFT, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

PUBLIC IMPROVEMENT—damage to private property, not taken for public use—as result of construction of—loss of rentals or loss or inconvenience to business—not damage to property within meaning of constitutional provision against taking or damaging private property without just compensation. The constitutional provision, against taking or damaging private property without just compensation, (section 13, Article II of the Illinois Constitution, 1870) does not entitle an owner of private property, not taken for public use, to compensation or damages for inconvenience, expense, loss of business or rentals, resulting from the temporary obstruction of the street, and temporary interference with ingress to or egress from property of such owner, incidental to the construction of a public improvement.

SAME—same—same—same—temporary—definitely distinguished from permanent. While it is somewhat difficult to determine how long a construction period may cover and still be classified as a temporary condition, the word temporary is definitely distinguished from the word permanent, and where it appears from complaint by owner of private property, not taken for public use, asking for an award for damages for interference with ingress to and egress from such property, alleged to have been occasioned by construction of public improvement, that at the completion of such improvement, full ingress and egress was restored, such interference is temporary.

NEGLIGENCE—persons under contract with State—State not liable for. The State is not liable for damages occasioned by the misfeasance or negligence of its officers, agents, servants, or employees or of persons under contract with it.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein represents that in July, 1934 the City of Chicago relinquished to the State of Illinois, control of a portion of North Clark Street lying immediately south of Devon Avenue, upon a part of which the property of claimant fronted, and that the State of Illinois thereupon proceeded to widen the roadway of North Clark Street and to repave the roadway as widened. That about the 1st of October, 1934 respondent removed a portion of the side and tore up a portion of the pavement in front of claimant's property on North Clark Street and Devon Avenue, and that thereafter permitted the sidewalk and the roadway to be so torn up that

neither could be used for traffic and failed and neglected to pave the roadway on Clark Street and on Devon Avenue until the early part of 1935, so that claimant's property was not accessible from Clark Street or from a portion of Devon Avenue except in a limited manner and this only for pedestrian traffic. Claimant represents that the premises in question were improved with a two-story building rented for store and office purposes by tenants who would have continued to pay rental therefor if accessibility thereto had continued; that by reason of the delayed repairs, entrance to and from the premises was so interfered with that claimant's tenants complained of loss of business, and claimant was obliged to decrease her rentals and thereby suffered a loss of \$12,000.00 in rentals.

Claimant also contends that in the course of said construction work respondent removed and destroyed four ornamental light posts with wiring and conduits, which claimant had installed at an expense of \$800.00 which became a total loss to claimant and for which it asks an award in said sum.

A motion has been filed by the Attorney General to dismiss the complaint as failing to state a valid basis for an award, for the reason:

(a) That respondent is not liable for damages resulting from temporary inconvenience in the use and occupancy of property occasioned by the construction of a public improvement.

(b) That the respondent is not liable for damages occasioned by the misfeasance or negligence of its officers, agents, servants or employees or of persons under contract with respondent.

The Bill of Particulars attached to the complaint varies from the recital in the latter, by stating that the loss of lamp posts was "by destruction by contractor." Any loss due to acts of such contractor would not authorize an award for damages against the State. (*Siekman vs. State*, No. 3027, Court of Claims, decided March 25, 1938. *Parker vs. State*, 6 C. C. R. 71.)

The constitutional provision, against taking or damaging private property without just compensation, (*Section 13, Article II of the Illinois Constitution, 1870*) does not entitle an abutting property owner to compensation or damages for inconvenience, expense, loss of business or rentals, resulting from the *temporary* obstruction of the street and interference with egress or ingress, incidental to the construction of a public improvement. (*Osgood vs. City of Chicago*, 154 Ill.

194; *Transportation Co. vs. City of Chicago*, 99 U. S. 635; *Lefkowitz vs. City of Chicago*, 238 Ill. 23; *Chicago Flour Co. vs. City of Chicago*, 243 Ill. 268.)

It is somewhat difficult to determine how long a construction period may cover and still be classified as a temporary condition, but "temporary" is definitely distinguished from the word "permanent." So far as it appears from the complaint herein, access to claimant's property was not permanently closed, and when the construction work was finished full accessibility was again existent.

In the case of *Chicago Flour Company vs. City of Chicago*, 243 Ill. 268, plaintiff sued the city to recover damages which it sustained as the result of being deprived of the use of a certain switch track during a construction period. The Supreme Court in considering the matter said,

"The only invasion of their rights complained of, is the temporary interference with the ordinary means of access to and egress from their property during the progress of the work. It is well settled that inconvenience, expense or loss of business occasioned to abutting owners by the temporary obstruction of a public street, and the consequent interference with their right of access to their property, made necessary by the construction of a public improvement, gives no cause of action against the municipality. The Constitution provides no remedy for the property owner under such circumstances. Such claim is not damage to property not taken, within the meaning of the Constitution."

Lefkowitz vs. City of Chicago, 238 Ill. 23;

Osgood vs. City of Chicago, 164 Id. 194;

Northern Transportation Co. vs. City of Chicago, 99 U. S. 835.

Lord vs. City of Chicago, 274 Ill. 313.

No sufficient legal cause for an award appears in the complaint, and the motion of the respondent is hereby allowed, and the claim is hereby dismissed.

(Nos. 1833-1834. Consolidated—Claimant awarded \$8,933.01 in case No. 1833—
No. 1834—Claim denied.)

GEORGE C. PETERSON CO., No. 1833, GEORGE C. PETERSON CO., No. 1834,
Claimant, vs. STATE OF ILLINOIS. Respondent.

Opinion filed June 14, 1939.

BUSSIAN & DeBOLT, for claimant.

JOHN E. CASSIDY, Attorney General; **GLENN A. TREVOR**,
Assistant Attorney General, for respondent.

PRINCIPAL AND AGENT—*when act of agent binds principal.* In transacting its affairs, the State, through its lawfully constituted departments, must designate certain individuals to perform certain duties and when Department of Purchases and Construction designates the State Purchasing Agent as the one with whom parties offering to enter into contracts with State should deal, State is bound by contract executed by him on behalf of State, especially when same is executed by party in accordance with proposal and specifications prepared by State Department, providing that bids must be addressed to said agent, deliveries under the contract made on his order and that vouchers for approved bills might be issued by him.

CONTRACTS—*partly printed and partly written—when written portion will control.* Where a contract is partly printed and partly written and there is a conflict between the printed part and the written part, the written part must control.

DAMAGES—*breach of contract—measure of.* Where a contract is breached by party in failing and refusing to accept goods contracted for, the proper measure of damages for such breach is the loss of profits suffered by other party to contract occasioned by such non-acceptance, less any expenses that would have been necessarily incurred by him in performing his part of the contract.

COURT OF CLAIMS—*jurisdiction—limitation of in claims arising under Illinois Waterway Act.* A claim for damages against the State for damages for breach by it of its contract in failing to accept and pay for goods contracted for, is but a contractual demand and not a claim for damages to persons or property, or within the provisions of Section 24 of said Act, even though said goods were to be supplied to the Division of Waterways, and Court of Claims has jurisdiction to consider such claim.

MR. JUSTICE YANTIS delivered the opinion of the court:

The claimant in each of the above entitled cases is the same, the George C. Peterson Company being a corporation licensed under the laws of the State of Delaware with its principal offices in the City of Chicago. It is principally engaged in the business of buying, selling and dealing in petroleum products, wholesale and retail.

The declarations in both cases were filed at the same time, i. e. on November 19, 1931. In the former case, No. 1833, claimant alleges that on the 15th day of August, 1929 it entered into a contract with the State of Illinois whereby it obligated itself to sell and deliver 350,000 gallons of gasoline at 11.9c per gallon to the State of Illinois, to be shipped to the Division of Waterways, Dresden Island Lock and Dam, near Divine, Illinois, and that the respondent by said contract obligated itself to purchase and receive said gasoline at the price above stated; that pursuant to said contract the State accepted delivery of 28,226 gallons of such gasoline, but in

disregard of inquiries by claimant for further shipping orders covering the shipment of the balance of said gasoline which it was then and there ready and willing to deliver, the State thereafter failed to accept any part of such remainder. That due to the refusal of respondent to accept the balance of the gasoline under the terms of said contract, claimant had been damaged in the sum of Fifteen Thousand (\$15,000.00) Dollars.

In the second complaint, i. e. No. 1834, claimant alleges that on the 7th day of May, 1929 it entered into a contract with the State of Illinois whereby the claimant contracted and obligated itself to sell and deliver gasoline, kerosene and other petroleum products to the State of Illinois to be shipped to the Division of Waterways Brandon Road Lock & Dam near Joliet, Illinois, and the State of Illinois by said contract obligated itself to purchase and receive the same in the quantity, quality and the price therein alleged. That after a small portion of the merchandise contracted for had been delivered, as set forth in the complaint, the respondent declined to accept the remainder of said petroleum products and that the plaintiff, by reason of such refusal of respondent to perform the terms of its agreement, has sustained damages in the sum of Five Thousand (\$5,000.00) Dollars.

A motion to dismiss the complaint was filed by respondent in each case, and on September 11, 1934 an order was entered that such motion would be taken with the case. Thereafter evidence was taken and certain stipulations entered into between the parties, the last of such stipulations being filed October 24, 1938. Final Statement, Brief and Argument was filed by claimant November 14, 1938 in each case.

Respondent contends that the officer who purported to enter into the contracts on behalf of respondent had no authority to bind the latter; that respondent in and by such contracts did not agree to accept the amount of gasoline and petroleum products set forth in such contracts; that there was no appropriation at the time of the making of such contracts out of which payment could be made for the items contracted for; that the Court of Claims has no jurisdiction to determine the present claims upon their merits because of another forum to which such matter should have been submitted, and further that if an award was entered by the court the legislature could not make a valid appropriation in pay-

ment thereof. In addition to the foregoing, counsel for respondent disagree with counsel for claimant as to the proper measure of damages for any loss suffered by claimant herein.

Photostatic copies of the specifications upon which the contracts in question rested, appear as part of the evidence, and by stipulation filed October 24, 1938, the parties herein agree that such photostatic copies are true copies of the original proposals submitted by the claimant, in answer to a notification from the respondent through its Division of Purchases and Supplies of the Department of Purchases and Construction that such respondent would receive sealed proposals for furnishing and delivering to the Division of Waterways, F. O. B. Dresden Island Lock & Dam site at Divine, Illinois, certain gasoline under the one contract and certain gasoline, grease and other oil products described in the second specifications; that attached to the original proposals were copies of the articles, quantities and quality thereof taken from the respective notifications, together with the price per unit at which the articles specified in such notifications would be furnished by claimant; that the original notifications were received by claimant from respondent, and that there was written on such notifications the price per unit at which said articles therein specified would be furnished by claimant at the location designated, and that the price therein stated was inserted as a bid price by authority and consent of the claimant; that O. L. Peterson was duly authorized by the claimant corporation to make the proposals in question. The stipulation further states that the items specified in such proposal were to be charged to the appropriation for the Illinois Waterway Fund Construction and were to be delivered by truck or wagon to the State of Illinois Division of Waterways Dresden Island Lock & Dam, Divine, Illinois. That the purchase order was delivered by the Division of Purchases and Supplies of said Department of Purchases and Construction to and was accepted by the claimant in response to said proposal.

The proposal by claimant company in each instance consists of a brief statement printed at the bottom of the State's specifications, to the effect that the bidder proposed to furnish, in accordance with the terms of the specifications, the

articles therein set forth, opposite to which the bidder had indicated a price. Such proposal contains the following statement:

"It is agreed that deliveries are to be made to the institutions in accordance with conditions on sheet No. 2."

This proposal is directed to the "Division of Purchases and Supplies of the Department of Purchases and Construction." The proposal and the specifications to which it refers is a printed form which is used in the general purchase of supplies for the various institutions of the State, and "Sheet No. 2" thereof contains a list of thirty-one State institutions with railroad delivery facilities indicated after the name of each. The specifications contained two additional typewritten sheets, the one in case No. 1833 containing the following paragraph, to-wit:

"Sealed proposals will be received in the office of the Division of Purchases and Supplies, Capitol Building, Springfield, Illinois, until 2 o'clock P. M., Tuesday, August 6, 1929, on 350,000 gallons of grade No. 1 gasoline. Necessary blanks and full information furnished upon application to the Division of Purchases and Supplies. The right is reserved to reject any and all bids."

Beneath this paragraph claimant had noted a bid price for "350,000 gallons of grade No. 1 gasoline at a unit price of 11.9c per gallon." Thereafter follows certain specifications as to color, corrosion, distillation range, acidity and sulphur. A further clause provides as follows:

"Bidder to furnish and install free of all extra cost to State, tank storage of 1000 gallons or more with pump or pumps for distribution. Deliveries to be made by tank wagon (or auto truck) in quantities as required, within four hours of telephone order from superintendent on the job. Estimated requirements from 1000 to 1500 gallons per day, to be delivered to State of Illinois Division of Waterways Dresden Island Lock & Dam site, Divine, Illinois."

The foregoing is signed:

"Very truly yours

"Division of Purchases & Supplies

"A. W. Dally

"State Purchasing Agent."

Sheet No. 1 of the specifications contains:

"BIDS:

"All bids must be addressed to 'State Purchasing Agent,' State House, Springfield, Illinois.

"DELIVERIES:

"Deliveries are to be made upon order of the Managing Officers of the institutions or the State Purchasing Agent.

"PAYMENTS:

"Vouchers for approved bills will be issued--on orders duly issued by the Managing Officer or the State Purchasing Agent.

"SAMPLES:

"All samples must be addressed to 'State Purchasing Agent.'"

In transacting the demands of its business, the Department of Purchases and Construction must designate certain individuals to perform certain duties. In the Division of Purchases and Supplies the State Purchasing Agent has been indicated, as shown in the specifications issued by the department, as the one with whom parties contracting for the sale of supplies, should deal.

The motion to dismiss the claim, as filed herein by respondent, was based upon two reasons only, i. e. that the respondent, according to the complaint, was obligated only to take the products it might need, and that the complaint contained no allegation that it did not take same; and second, that the claimant did not allege in its complaint what the market price of the products were so that it could appear from the complaint whether or not any damage had accrued. The State did not file an answer or plea to claimant's complaint, but filed its motion to dismiss as above stated. The court is considering this motion with the case, but the case stands, under the rules, as though the State had filed a plea of general issue. The Attorney General contends that Daily, the State Purchasing Agent, had no authority to bind the State by signing the contract in question; that only the Director of the Department could bind the State in such manner.

Claimant contends that as the execution of the contracts in question and their validity was not denied by a verified plea, it is not necessary to prove the authority of the agent who signed on behalf of the State. Counsel for claimant contend that the respondent should not be permitted to deny, on the trial, the execution and legality of the contract in question and cites in behalf of his contention the following, i. e. *Schuyler County vs. Missouri Bridge & Iron Co.*, 256 Ill. 348; *City of Chicago vs. Peck*, 196 Ill. 260; and *Melluish vs. City of Alton*, 230 Ill. App. 250.

Regardless of the question of pleading, we believe the record herein discloses that A. W. Daily, as State Purchasing Agent, had authority to act for the State in the manner herein disclosed, and that the contract between claimant and the State was validly entered into and was binding upon respondent.

The specifications contain a further provision as follows:

"QUANTITIES:

"The Managing Officers will order within 10 per cent, more or less, of the quantities shown in the purchase order. The contractor will not be called upon to deliver a greater excess than 10 per cent and the State shall not be called upon to accept more than the actual needs of the institution.

"DURATION OF CONTRACT:

"All articles furnished under contract are for three months' supply, unless otherwise specified, and it is mutually understood and agreed that the said contract automatically expires on the last day of the current quarter."

The invitation for proposals or bids do not contain any term limit or specified time within which the supplies in question were to be furnished other than that just quoted under **"DURATION OF CONTRACT,"** being the typewritten paragraph on sheet No. 2, to-wit:

"Delivery to be made by tank wagon or auto truck in quantities as required within four hours of telephoned order from superintendent on the job. Estimated requirements from 1000 to 1500 gallons per day."

From the evidence herein in case No. 1833 we find that claimant company and respondent entered into a contract as of August 15, 1929, whereby the claimant agreed to sell and deliver in accordance with the terms of said contract, to the State of Illinois, 350,000 gallons of gasoline at 11.9c per gallon to be shipped to the Division of Waterways Dresden Island Lock & Dam site at Divine, Illinois in accordance with estimated requirements of from 1000 to 1500 gallons per day; delivery to be made in quantities as required upon telephone orders from the superintendent on the job. We are of the opinion that the proviso in said contract that it was subject to a duration of three months, and that such contract was to automatically expire on the last day of the current quarter covered by said contract, is limited or restricted by the typewritten statement that was written into such contract whereby the total amount of gas to be received under the contract,

was estimated at 1000 to 1500 gallons per day. To use this amount of gas, even at the daily delivery of the maximum of 1500 gallons, would require two hundred ten (210) days, after allowing for a reduction of ten (10) per cent, under the terms of the specifications.

This in itself evidences that the typewritten statement in the specifications is to be taken as a modification of the printed matter found under the heading of "DURATION," and that the latter is to be considered in connection therewith.

Where the provisions of a contract which are partly printed and partly typewritten and the printed and typewritten provisions are fairly in conflict, the typewritten provision must control.

To this effect is *Warner Const. Co. vs. Lincoln Park Com'rs.*, 278 Ill. App. 42-52. In this case the defendant contended that where there is an apparent conflict between the printed part and the typewritten part of a contract, the typewritten part must control. The court sustained the contention citing 13 CORPUS JURIS, at page 536, where it is said:

"Writing and Printing. Where, as in the use of printed forms, a contract is partly printed and partly written, and there is a conflict between the printing and the writing, the writing will prevail. Handwriting will under the same rule prevail over typewriting, and typewriting over printing."

It further appears from the evidence that the State, pursuant to said contract, accepted delivery of 28,226 gallons of gasoline under said contract and paid claimant therefor. Oscar L. Peterson testified, as Vice-president of claimant company, that the last delivery of gasoline under this contract was made about January 12, 1930; that the official in charge of the job notified his company verbally at that time to make no further deliveries; that the price of gasoline on that date was 8.535c per gallon at Joliet, Illinois, which was the nearest point of delivery to Dresden Island Lock & Dam site; that the transportation cost from Joliet to Dresden Island would probably be one-quarter ($\frac{1}{4}$ c) cent per gallon. Witness Peterson further testified that so far as he knew respondent did not obtain any gasoline from anyone else up until the 12th of January, 1930, and that prior to that time the contract was not violated in any way. Mr. Peterson testified that subsequent to that date he saw a truck of the Hamlin Oil Company emptying the contents of tank wagons into the storage tanks at Dresden Island and that he believed it to be

gasoline. That these tanks have a capacity of about 45,000 gallons, and that he received information from the president of that company that during the seven months subsequent to January 12, 1930, the Hamlin Oil Company delivered approximately 250,000 gallons of gasoline to the Dresden Island job.

Claimant contends in case No. 1833 that it was ready, able and willing to furnish the full amount of gasoline quoted in its bid, and seeks payment of his lost profit on 321,774 gallons, being the difference between the amount accepted by the State prior to January 12, 1930, and the total of 350,000 gallons stated in its bid, or \$11,326.44; this being, as he contends, the difference between the contract price of 11.9c per gallon and the market price of 8.535c per gallon at Joliet, Illinois on January 12, 1930.

We believe that the contract was for a definite amount and enforceable by both parties; that even if it was a requirement contract, the State did not take its full requirement from claimant, but after ceasing to call for supplies from claimant, obtained gas elsewhere; that the total of 350,000 gallons was subject to a reduction of ten (10) per cent under the specific terms of the contract, and that the quantity of gas for which claimant has the right to demand payment is 286,774 gallons.

We further believe that the proper measure of damages is the loss of profit suffered by claimant in connection with such non-acceptance of supplies.

In the case of *Nestler vs. Pure Silk Hosiery Mills*, 242 Ill. App. 151, page 165, the court said—

"The general rule is that the plaintiff is entitled to recover the total benefit of the contract, less expenses; * * * that without evidence to the contrary, the amount which would have been made as a profit if the contract had been kept, is the measure of damages if the contract is broken."

The contract price between claimant and the State was 11.9c per gallon. To the cost price of 8.535c at Joliet should be added the transportation cost of one-fourth ($\frac{1}{4}$ c) cent per gallon, to which Mr. Peterson testified, making a total cost of 8.785c per gallon, and leaving a profit of 3.115c. Claimant's profit at this price on 286,774 gallons would have been \$8,933.01.

The Act by which the Court of Claims is created (Laws 1917 p. 325) contains this provision in prescribing the court's powers and duties:

"6. The Court of Claims shall have power

"(4) to hear and determine all claims and demands legal and equitable, liquidated and unliquidated, ex contractu and ex delicto, which the State as a sovereign commonwealth should, in equity and good conscience, discharge and pay."

Under sub-section 2 the court is further authorized to make rules governing its practice and procedure, which shall be as simple, expeditious and inexpensive as reasonably may be. But few States have seen fit to lay aside their sovereign immunity to financial demands made against the State. In construing the above Act, by which Illinois seeks to give to claimants a forum in which to present their demands, this court has endeavored to award payment upon all claims upon which the State would be liable if suable in a court of law, and which the State should, in equity and good conscience, discharge and pay. The position of the court in this regard is fully set forth in the case of *Crabtree vs. State*, 7 C. C. R. 207.

In the instant case the evidence discloses that there was a valid contract upon the part of claimant and respondent for the purchase of the gasoline in question, and that the parties to such contract acted in pursuance thereof, and that the claimant delivered and the State received a portion of the amount of gasoline which the claimant had obligated itself to furnish.

In support of his contention that this claim is one arising under the terms of the Illinois Waterway Act and that therefore the Court of Claims has no jurisdiction, the Assistant Attorney General cites the case of *Hanna, et al vs. State*, 8 C. C. R. 352. That case was one for alleged damages to property by obstruction of the flow of water in the course of construction of the Illinois Waterway. *Section 21 of said Act (Canals and Rivers, Ch. 19, Par. 114, page 214, Cahill's Ill. Rev. Statutes, 1931) provides—*

"All claims for damages to persons (except to employees) and all claims for damages to property, real or personal, shall be ascertained, determined and fixed by the Department of Public Works and Buildings, and paid out of any moneys which shall from time to time be provided for the payment of such claims * * *.

"All claims for damages to persons or property shall be filed with the Department of Public Works and Buildings within five years after the injury complained of."

The instant claims (No. 1833 and No. 1834) are not for damages to person or to property, but are contractual de-

mands arising out of the alleged breach of its contracts by the State. The limitation as to jurisdiction, contended for, does not apply and we find that the Court of Claims may properly consider the claims now before us.

From what funds may the damages herein, if any, be paid?

Article 14, Separate Section 3 of the Constitution of Illinois of 1870 (Ill. Rev. Statutes of 1927, p. 26) provides as follows:

"The General Assembly shall never loan the credit of the State or make appropriations from the treasury thereof, in aid of railroads or canals;

"Provided, that any surplus earnings of any canal, waterway or water-power may be appropriated or pledged for its enlargement, maintenance or extension; and

*"Provided, that the General Assembly may * * * provide, for the construction of a deep waterway * * * and authorize the issue of bonds in a total amount not to exceed twenty million dollars * * *."*

It appears from the foregoing that claimant's damages can therefore be compensated only out of the moneys in the Deep Waterway Fund. Claimant apparently recognized this for in the stipulation filed by the parties on October 24, 1938 they agreed that the items specified in the proposal for contract made by claimant, were to be charged to the appropriation for the Illinois Waterway Fund Construction.

The court is not informed as to what money may be available with which to pay the award herein entered, but we find that claimant is entitled to an award in case No. 1833 in the sum of \$8,933.01.

The contract at issue under the case of *George C. Peterson Co. vs. State of Illinois*, C. of C. No. 1834 was, according to the evidence, entered into on May 7, 1929. The proposal and specifications precedent to same are similar to those involved in case No. 1833 except for the dates therein and the typewritten description of merchandise covered by said proposal. Said proposal and specifications contain the following typewritten matter:

*"Scaled proposals will be received by the Division of Purchases and Supplies of the Department of Purchases and Construction * * * until 2 o'clock P. M. Thursday, April 18, 1929 for furnishing and delivering to the Division of Highways 285,000 gallons of gasoline and 12,000 gallons of oil, for furnishing and delivering to the Division of Waterways F.O.B. Brandon Road Lock & Dam, Joliet, Illinois wagon or truck delivery, 7,850 gallons motor oil, 8,200 pounds grease, 600 gallons kerosene and 225,000 gallons gasoline. Full information and necessary blanks furnished upon application to the Division of Purchases and Supplies."*

Thereafter follows a request for a quotation by bidders of a price for furnishing the Division of Waterways P. O. B. Brandon Road Lock & Dam, Joliet, Illinois for delivery by truck or wagon of the above quantities of motor oil, grease, kerosene and gasoline to be delivered to the Division of Waterways Brandon Road Lock & Dam, Joliet, Illinois. Claimant company signed the proposal form attached to said specifications and inserted after the various items the price per gallon or pound at which it agreed to furnish the articles in question for the Brandon Road Lock & Dam delivery. No proposal was made for sale of the 285,000 gallons of gas or the 12,000 gallons of oil to the Highway Department.

These specifications contain the same printed section found in the specifications in case No. 1833, as to "Duration of Contract," i. e.:

"Duration of Contract—All articles furnished under contract are for three (3) months' supply, unless otherwise specified, and it is mutually understood and agreed that the said contract automatically expires on the last day of the current quarter."

These specifications do not however contain the type-written provision that appears in the other specifications whereby the required needs of the purchaser were stated at 1000 to 1500 gallons of gasoline per day. Neither is there any other statement written or printed into the document that can be construed as an exception or limitation of the Duration of Contract Clause or as a fulfillment of the words therein, "unless otherwise specified."

According to the testimony of Mr. Peterson, President of claimant company, the last shipment of gasoline and other petroleum products under the contract of May 7, 1929 (being case No. 1834) was July 31, 1929. Prior to that time the State had accepted 56,701 gallons of gasoline on the Brandon Road job, and had also accepted delivery of certain portions of grease and motor oil, under such contract. Mr. Peterson testified that claimant company furnished all the gas and oil that was used on the Brandon Road Lock & Dam job required as the work progressed up to July 31, 1929, and that after that date no such supplies were furnished by claimant and the respondent obtained its gas and oil from other sources thereafter. The only testimony appearing in the record of such delivery by other parties is that Mr. Peterson who testified that *some time in August, 1929* he saw a tank wagon of the

Texico Company deliver the supplies to the gasoline tanks on this job.

It appears from the record that no breach of the contract was committed by the State during the three months following the date of the contract, i. e. May 7, 1929.

The court finds that the duration of such contract was, by its terms, limited to a period of three months from the date thereof, and that said contract automatically expired at the end of such time, i. e. on August 7, 1929. Further, that the State was within its rights, under the specific wording of such contract to consider same cancelled at the end of such three months and to thereafter purchase its supplies independently thereof. As claimant was paid in full for all supplies furnished by it under the terms of such contract, there is no legal basis upon which an award can be made by the court in case No. 1834 and an award therein is hereby denied, and the claim dismissed.

An award is hereby made in favor of claimant in the case of *George C. Peterson Co. vs. State of Illinois*, Court of Claims No. 1833 in the sum of \$8,933.01, payable out of the Waterway funds as hereinabove noted.

(No. 3200—Claimant awarded \$2.32.)

THE WESTERN UNION TELEGRAPH COMPANY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 15, 1939.

Claimant, pro se.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

~~SERVICES—lapse of appropriation out of which could be paid—before payment—when award for may be made.~~ The facts in this case are almost identical with those in *Metropolitan Electrical Supply Company vs. State*, No. 3270, *supra*, and the opinion in that case is controlling herein.

Per Curiam:

On February 8, 1938, claimant filed its complaint with the clerk of this court and averred that it is a foreign corporation, with its principal place of business in the State of Illinois, at 427 South LaSalle Street, Chicago, Illinois; that

at the special instance and request of the State of Illinois, through its duly authorized officers and upon agreement to pay therefor the claimant furnished the State of Illinois, regular time service, at the request of the Department of Public Health of the State of Illinois, for a period from April 22, 1937 to July 1, 1937, as appears by a statement attached to the complaint; that the usual and customary charge for said service was \$2.32; that prior to the filing of this claim, the claimant duly demanded payment of said sum from the Department of Public Health of the State of Illinois, at Springfield, Illinois, but the payment was refused on the technical ground that the account had not been vouchered during the first half of the year 1937; and that the whole of said sum is now due and unpaid.

Claimant asks for the sum of \$2.32 with interest from July 1, 1937, together with costs and disbursements.

It is agreed that these services were rendered and that the amount charged is a reasonable and fair charge; that a demand was made for the payment and that the bill was lawfully contracted, and the claimant has not been paid.

As noted above the bill was from April 22, 1937 to July 1, 1937. The services were to and for the use of the State at the Division of Diagnostic Laboratory, Department of Public Health, Springfield, Illinois. It is charged that this appropriation out of which this bill should have been paid, expired prior to September 30, 1937.

This court has repeatedly held that where claimant has rendered services or furnished supplies to the State on the order or request of an official authorized to contract for the same, and submits a bill therefor within a reasonable time, and due to no negligence or fault on the part of claimant same is not approved and vouchered for payment before the appropriation from which it is payable lapses, an award for the reasonable and customary value of the services or supplies will be made where, at the time the obligation was incurred, there were sufficient funds remaining unexpended in the appropriation to pay for the same.

An award, therefore, in the sum of \$2.32 will be made to the Western Union Telegraph Company. Interest on this, however, will be denied because it does not appear that the bill was rendered at the proper time and could not be allowed without an award from this court. Costs are asked but we

know of no expenditure of funds which could be assessed as costs as a matter of law. No award, therefore, is made for interest and costs.

(No. 2930—Claimant awarded \$227.91.)

JOSEPH F. PAWLAK, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 15, 1939.

J. W. WIMBISCUS, for claimant.

OTTO KERNER and JOHN E. CASSIDY, Attorneys General;
GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—when award for compensation for partial loss of use of finger may be made under. Where it appears that employee of State sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra hazardous employment, resulting in partial loss of use of finger, an award for compensation for same may be made, in accordance with the provisions of the Act, upon compliance with the requirements thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

By his amended complaint herein claimant seeks an award of \$612.00 for the alleged loss of use of the index finger of his left hand, resulting from an accident arising out of and in the course of his employment as an assistant cook at the Illinois Soldiers' and Sailors' Children's School at Normal, Illinois. The evidence discloses that sometime during the period from October 1st to December, 1935, claimant, while engaged in his duties was cutting a veal carcass; that he let the knife slip, resulting in a deep gash from the tip of the finger to the first joint, severing the tendon. He received immediate treatment and care at the institution hospital, and three of the attending nurses have testified to the fact of such injury.

Dr. James Moran of Spring Valley examined the patient in October 1936, at which time he found that plaintiff was unable to flex the first phalange of his left index finger because of the tendon being severed, and that the finger is in a condition of chronic extension. That claimant can flex the finger at the second joint, but cannot touch the palm of his

left hand with the tip of his finger. Claimant must depend on the remaining fingers for lifting and holding objects. While claimant can flex his finger at the second joint, at right angles, such second joint and second phalange are involved to some extent.

Claimant had no wife or child at the time of the accident. His actual wages for the year preceeding such accident including maintenance allowance was \$845.00 or an average weekly wage of \$16.26. He received his regular wages at all times after the accident and the only other item claimed herein, in addition to \$600.00 specific loss of the finger is \$32.79 for expenses incurred in three trips to Chicago to consult Dr. Thomas at the Illinois Research Hospital as requested by respondent.

We find from the record that claimant suffered an accidental injury while an employee of respondent; that the accident arose out of and in the course of his employment; that respondent had due notice of said injury and that notice of claim and application for payment were made as required by the provisions of the Workmen's Compensation Act. That as a result of said accident claimant suffered a 60% loss of use of the index finger of the left hand, and is entitled to an award under the terms of Section 8 (c) 6 at the rate of \$8.13 per week for 60% of 40 weeks or \$195.12, plus the further sum of \$32.79 expenses incurred at the request of respondent in connection with medical and surgical care, under the provision of Section 12 of the Workmen's Compensation Act.

An award is therefore hereby allowed in favor of claimant Joseph F. Pawlak for the sum of Two Hundred Twenty seven and 91/100 (\$227.91) Dollars for 60% loss of use of the index finger of the left hand and surgical care in connection therewith.

This award being subject to the provisions of an Act entitled, "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," approved July 3, 1938 (Sess. Laws 1938 p. 83), and being by the terms of such Act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from said appropriation from the General Revenue Fund in the manner provided for in such Act.

(No. 3061—Claimant awarded \$35.57.)

JOSEPH HUDIK, DOING BUSINESS AS CICERO COAL COMPANY, Claimant,
vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 15, 1939.

WEINBERG, KJELLANDER, O'FARRELL & AMES, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE,
Assistant Attorney General, for respondent.

SUPPLIES—fuel purchased without compliance with Sections 29 and 30 of Civil Administrative Code—to meet emergency—without any fraud—amount claimed, trifling. Where claimant furnished coal, which at the time was needed for heating headquarters of Illinois Highway Maintenance Police, on order of one not authorized under Sections 29 and 30 of Civil Administrative Code, and it appears that same was of the reasonable value of the amount claimed, an award may be made, where amount involved is trifling.

Per Curiam:

Joseph Hudik, doing business as Cicero Coal Company at 1545 South 56th Avenue, Cicero, Illinois, complains that on the 28th day of September, 1933, he sold to the State of Illinois, 2,500 pounds of Chestnut Coal and 2,500 pounds of Range Coal to be used by the Illinois Maintenance Highway Police at 123rd Street and Cicero Avenue, Alsip, Illinois; that on the 21st day of October, 1933, he presented a bill to the Division of Highways of the Department of Public Works and Buildings of the State of Illinois for payment.

It is stipulated that the reasonable value of the coal was \$35.57.

The bill was placed in line for payment by the Department of Public Works and Buildings but was disapproved by the Department of Finance of the State of Illinois, and no warrant for said sum was ever issued and the claimant has never received payment for his coal.

The Attorney General argues that this claim should not be allowed because the party who ordered the coal for the use of a branch of the State had no authority, under Sections 29 and 30 of the Civil Administrative Code, which provides as follows:

"All supplies of fuel purchased for the department shall be let by contract to the lowest responsible bidder. Advertisements for bids shall be published for at least ten days in one or more of the daily newspapers of general circulation published in each of the seven largest cities of the State, de-

terminated by the then last preceding Federal census. The officer authorized by law to make contracts for fuel shall prescribe rules and regulations to be observed in the preparation, submission and opening of bids. All contracts for fuel shall be made subject to the approval of the Governor.

The price paid for fuel shall not exceed the following:

For anthracite coal, twelve dollars per ton;

For Pennsylvania bituminous, Pocahontas and West Virginia smokeless, eastern Kentucky and Ohio coals, all of the bituminous type, nine dollars per ton;

For Illinois, Indiana, western Kentucky, Missouri and Iowa coals, all of the bituminous type, seven dollars per ton;

For any other coal of the bituminous type, seven dollars per ton."

In the stipulation it is admitted that the reasonable value of the coal was \$35.57.

This court will not where the sums claimed are large, approve of any departure from the statute in the purchase of any supplies for the State. Yet it is quite apparent that at the time this coal was purchased, fuel was reasonably needed for heating purposes. The statute provides that fuel shall be purchased by contract entered into by the lowest responsible bidder, and that the advertisements for bids shall be published in each of the seven largest cities of the State, and that the officer authorized by law to make contracts for fuel shall prescribe rules and regulations to be observed in the preparation, submission and opening of bids and that all contracts for fuel shall be made subject to the approval of the Governor.

We do not feel that it was the intent of the legislature that a procedure should be followed which would require an expenditure of funds equal to, or being a large part of the cost of the fuel to be purchased.

It is the opinion of the court that public interests could best be served by the purchase of fuel at a reasonable price. It also appears that an emergency undoubtedly existed. To get advertisements ready and to go through the forms prescribed by law, would undoubtedly take more than ten days. The Attorney General offers no solution of this problem, except the strict letter of the law. We view this as an exception to the general rule, and we believe that the claimant should be paid. No fraud is even suggested.

We, therefore, make an award in the sum of \$35.57 in favor of Joseph Hudik, doing business as Cicero Coal Company.

(No. 3115—Claimants awarded \$170.64.)

CHARLOTTE P. MARCHAND, EUGENIE P. CUSSON, MERCEDES P. CAMERON
AND JULES POULIN, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 15, 1939.

CHARLES W. FIRKE, for claimants.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE,
Assistant Attorney General, for respondent.

INHERITANCE TAX—*assessed and paid on basis decedent left no heirs—legal heirs subsequently found—having no notice of assessment of—re-appraisal and reassessment of.* The County Court has jurisdiction in petition by legal heirs of decedent dying intestate, for re-appraisal and reassessment of inheritance tax, where said tax was assessed on basis that decedent left no legal heirs surviving, and that his estate escheated to State, where petitioners are legally adjudicated as heirs of said decedent and who had no notice of his death or of the assessment of said inheritance tax.

SAME—*same—same—same—same—when award for amount in excess of that found due by County Court may be made.* Where inheritance tax was assessed and paid on estate of decedent, dying intestate, on basis he left no heirs, and subsequently, persons having no notice of such death or the assessment of said tax, are legally adjudicated as heirs of said decedent and file petition for re-appraisal and reassessment of said tax, in County Court, and same is reassessed in amount less than amount paid, an award for the excess amount assessed and paid will be made.

SAME—*claim for refund—limitations—when statute begins to run.* Where a claim for refund of inheritance tax, is based on reassessment of said tax, statute of limitations does not begin to run until reassessment is made.

Per Curiam:

The complaint was filed in this cause on August 23, 1937 and an amendment thereto was filed on October 4, 1937.

The facts as they appear from the stipulation are that the claimants, Charlotte P. Marchand, Eugenie P. Cusson, Mercedes P. Cameron and Jules Poulin were heirs at law of Edward Armstrong, who died on December 12, 1922, a resident of Adams County, State of Illinois; that at the time of Armstrong's death, he left no father or mother him surviving, no widow or children, or descendants of a deceased child or children him surviving; that in his lifetime he had one sister, Amelia Armstrong, and had no other brothers or sisters; that his sister, Amelia Armstrong died in the year of 1918, and at the time of her death, she left no husband her surviving, but did leave as children, the claimants; that at the time of Armstrong's death, the claimants were residents of the Dominion of Canada. It further appears from the stipulation

of the parties that the estate of Edward Armstrong was administered by P. J. Schlagenhauf, who had been duly appointed administrator by the county court of Adams County; that an inheritance tax proceeding was instituted before the county judge of Adams County, and on April 15, 1924, an order was entered in said proceedings appraising the fair cash market value of the net estate at \$2,221.11 and assessing a tax of \$212.11 on the basis that said net estate escheated to the County of Adams, and that said transfer was taxable at the rate of ten per cent after the allowance of an exemption of \$100.00; that on the 17th day of April, 1924, the administrator paid said tax to the county treasurer of Adams County.

It further appears from the stipulation of the parties that on May 8, 1924, after deducting the costs and fees allowed by the county judge as incidental to proceedings, and the county treasurer's commission, the county treasurer of Adams County remitted to the state treasurer the sum of \$170.64 in discharge of said inheritance tax; that the claimants had no knowledge of Edward Armstrong's death nor notice of the proceedings to assess an inheritance tax in said estate; that in 1936, claimants first learned of the death of Edward Armstrong, the administration of his estate, its escheat to the County of Adams and the assessment and payment of the inheritance tax as above set forth.

It further appears from the stipulation that on May 6, 1936, after a hearing in the county court of Adams County, an order was entered establishing claimants as the heirs of Edward Armstrong and directing the county treasurer to pay over to them the estate escheated to the county; that on September 13, 1937, after a hearing upon the petition filed by claimants to reassess the inheritance tax in the estate of Edward Armstrong, an order was entered by the county court of Adams County reassessing said tax on the basis of a net estate of \$2,221.11, passing to claimants as nephews and nieces of Edward Armstrong, deceased, as follows:

| Beneficiary, relationship and description of property | Appraised Fair Market Value | Statutory exemption | Taxable | | |
|---|-----------------------------------|------------------------|---------------|--------------|------|
| | | | Cash Value | Tax Fixed | Rate |
| Charlotte P. Marchand..... | 555.27 | 500.00 | 55.27 | 3.12 | 6% |
| Eugenie P. Cusson..... | 555.28 | 500.00 | 55.28 | 3.12 | 6% |
| Mercedes P. Cameron..... | 555.28 | 500.00 | 55.28 | 3.12 | 6% |
| Jules Poulin | 555.28 | 500.00 | 55.28 | 3.12 | 6% |

It further appears from the stipulation that on September 23, 1937, the tax as so reassessed, plus accrued interest, was paid by claimants to the county treasurer of Adams County and remitted to the state treasurer.

It clearly appears that claimants are legal blood relatives of Edward Armstrong, and from the time of his death, and prior thereto, they had lived in the Dominion of Canada; that these claimants are the only heirs at law of the said Edward Armstrong, deceased; that they properly filed their petition in August, 1937, praying for a reassessment of the inheritance tax in the estate of Edward Armstrong on the basis of the net estate of \$2,221.11, which they took as nephew and nieces of the said Armstrong; that on September 13, 1937, the county court of Adams County, Illinois, entered an order reassessing the inheritance tax as above set forth and on September 23 of the same year, these claimants paid to the county treasurer of Adams County, Illinois, the sum of \$5.89 each, being the tax fixed of \$3.12 plus 6% interest from the date of death of Edward Armstrong until such date of payment, making a total payment of \$23.50; that this payment was remitted by the county treasurer of Adams County to the State Treasurer of Illinois.

This claim is to recover the sum of \$170.64 paid under the personal assessment, which assessment was made under a mistake of fact.

All of these proceedings appear to have been regular.

The county court has jurisdiction of petitions for reappraisement and reassessment of inheritance tax. *People vs. Talbot*, 339 Illinois, 333.

The proceeding for reassessment is in the nature of a bill of review which lies where decree was rendered either without jurisdiction of defendants or for mistake of fact. Under the original assessment there was a mutual mistake of fact. The court found the entire estate to be \$2,221.11, with \$100.00 exemption, leaving a taxable interest of \$2,121.11 at 10%, a tax of \$212.11 with interest due of \$17.14, or a total tax of \$229.25. After deducting the costs and fees allowed by the county judge as incidental to the proceeding and the county treasurer's commission, there was paid to the State Treasurer of Illinois by the County Treasurer of Adams County, Illinois, the sum of \$170.64. The claimants are non-residents and never knew of this tax, never knew of the estate in fact, until

1936, when they took steps to establish their claim to the estate left by Edward Armstrong, deceased. The same was accordingly paid to them. On September 13, 1937, on petition by claimants to reassess the inheritance tax, the same was reassessed by the county court of Adams County, Illinois, finding that a smaller amount was due on the estate in view of the newly discovered facts of the relationship of claimants to Edward Armstrong.

The five year statute in the Court of Claims Act does not apply in this instance because claimants had no claim against the State until there was a reassessment of the tax by the county court. This reassessment was made on September 13, 1937, and the proper tax, as reassessed, has been paid. The difference between the amount of tax originally assessed and the amount subsequently assessed, is the sum of \$170.64.

An award, therefore, is made to the claimants in the sum of \$170.64.

(No. 3097—Claim denied.)

CITY OF OGLESBY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed December 20, 1938.

Rehearing denied June 15, 1939.

D. J. CAMPEGGIO and M. D. MORAHN, for claimant.

JOHN F. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

PUBLIC UTILITY TAX—*when payment of deemed voluntary, despite protest accompanying.* Even though payments of Public Utility Tax are accompanied by statements, that same are paid under protest and under contention that law under which paid is unconstitutional, such payments will be deemed voluntary where payer fails or neglects to avail itself of remedy afforded by, and within time provided in statute, restraining deposit of payments in State Treasury and having validity of law under which paid determined.

SAME—same. Where the taxpayer has some legal remedy against the coercive acts of the collecting officer, it is bound to avail itself thereof, and if it fails or neglects to do so, such payment is deemed voluntary.

SAME—when not deemed paid under compulsion or duress. Payment of tax will not be deemed compulsory or under duress, as a matter of law, when made to avoid penalties.

SAME—same—when payment of not deemed involuntary. Where it is alleged that tax was paid under compulsion, it must be shown that the compulsion brought to bear upon the payer, in order to render payment involuntary, has been of such a nature that it had no other reasonable means

of immediate relief from the same, except by making the payment, and where statute affords payer, a remedy, restraining payment of tax into State treasury and having validity of law under which paid determined, and it fails or refuses to avail itself of same, there is no compulsion and such payments are not involuntary.

SAME—payment under law subsequently declared unconstitutional—does not alone warrant refund. The fact that law imposing tax is declared unconstitutional after payments are made thereunder, and tax for that reason might be deemed illegal, is not of itself sufficient to authorize refund, of payments that have been turned into State treasury, where statute affords payer remedy restraining same and having validity of tax determined, and it fails to avail itself of the benefits thereof.

PROTEST—recovery of moneys paid under—must show notice of at time of payment—take action to enjoin payment until validity of law determined—remedy in court of general jurisdiction—failure to pursue bars recovery. A party paying money to public officer under protest, has under the statute, thirty days within which to file bill in chancery, restraining deposit of such money in State treasury, and having validity of law under which paid determined, and if he does not avail himself of such remedy, and such moneys are paid into State treasury, he cannot recover same, and an award for refund must be denied.

STATUTE—declared unconstitutional—proviso therein for refund of tax collected under fails. Where statute provides, among other things that any tax paid thereunder, not due, whether as result of mistake of fact or error of law shall be refunded to payer, and statute is declared unconstitutional, such proviso fails, and payer has no rights to any refund by reason of the provisions thereof.

MUNICIPAL CORPORATION—private corporation—no distinction in matter of Public Utility Tax refund. No distinction in the matter of tax refund can be made in favor of a Municipal Corporation, as distinguished from a private enterprise, in regard to payments under the Public Utility Tax Act, as said Municipal Corporations in the operation of a utility are engaged in their private capacity and not in their governmental capacity.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein seeks an award for a refund of public utility tax paid by it under the terms of an Act known as the Public Utility Tax Act, entitled "An Act in Relation to a Tax Upon Persons Engaged in the Business of Transmitting Telegraph or Telephone Messages, or Distributing, Supplying, Furnishing or Selling Water, Gas or Electricity," said Act being found in Smith-Hurd Illinois Revised Statutes, 1935, Chapter 120, Sections 440 et seq. The complaint recites that on August 12, 1935 claimant paid to the Director of Finance, the sum of One Hundred Fifty-four and 45/100 (\$154.45) Dollars and thereafter during each of the following months including February, 1937 made additional pay-

ments to a total amount of Two Thousand One Hundred Eighty-nine and 45/100 (\$2,189.45) Dollars; that each of said payments and the monthly tax returns accompanying same were made under protest, and under a contention that said tax and the Act under which same were collected were unconstitutional and void; that the Supreme Court of the State of Illinois on the 12th day of February, 1937 filed its Opinion in the case of the *City of Chicago vs. Ames*, reported in *365 Illinois Supreme, Page 529* in which it held said Act to be unconstitutional and void.

The Attorney General of the State has filed a motion to dismiss the claim on the following grounds:

"1. The complaint does not allege the necessary facts to show that the payments made were, in fact, made involuntarily or under duress or compulsion but only alleges the conclusion that such payments were so made.

"2. The complaint does not allege the necessary facts to show that it did not have a complete and adequate remedy at law or equity.

"3. The complaint does not allege under what provision of the constitution or statute of the State of Illinois a tax paid, even though under protest, where an injunction is not sought is not paid voluntarily, nor under what provision of the constitution or statute a tax paid voluntarily to the State of Illinois, even under an unconstitutional law, can be recovered back.

"4. The complaint does not allege facts that show said tax was not paid either through ignorance of the unconstitutionality of the Public Utility Tax Act, or a mistake of law as to the unconstitutionality of such Act.

"5. The Court of Claims has no jurisdiction to make an award where the State would not be liable at law or in equity if suable."

Both respondent and claimant have filed Briefs in support of their contentions and the matter has also been heard on oral argument. The claimant contends that the payments in question were each made under protest and under duress to avoid the penalties provided by statute, and were therefore involuntarily made. Claimant relies upon the ruling laid down in *Benzoline Motor Fuel Co. vs. Bollinger*, 353 Ill. 600, to the effect that payments made under an unconstitutional Act to avoid the penalties thereof are considered to have been

made under implied or moral duress and hence involuntarily made. Claimant seeks its award for a refund by reason of the following proviso contained in said Public Utility Tax Act, to-wit:

"If it shall appear that an amount of tax, penalty or interest has been paid which was not due under the provisions of this Act, whether as the result of a mistake of fact or an error of law, then such amount shall be credited against any tax due, or to become due, under this Act from the public utility which made the erroneous payment, or such amount shall be refunded to such public utility by the department."

Par. 445, Chap. 120, Ill. State Bar Statutes, 1935.

The only reason for the payment of said tax was because of the provisions of said Act. The payments were due and were made "*under the provisions of said Act*"—but such Act was declared unconstitutional. The determination of claimant's rights therefore rest not upon the above Act or any part thereof, but upon its general right, if any, to a refund for money voluntarily and improperly paid.

The Attorney General contends that the complaint herein does not allege any facts to show that the payments complained of were in fact made under duress or compulsion, and also urges as a further objection, that no injunction was sought by claimant to restrain the payment of said funds into the State Treasury, and that the failure of claimant to exercise its right to such injunction bars it from an allowance of its claim by this court.

Sub-section 2 (a), Section 172 of Chapter 127, Illinois Revised Statutes of 1937 provides:

"It shall be the duty of every officer, board, commission, commissioner, department, institute, arm or agency brought within the provisions of this Act by Section 1 hereof to notify the State Treasurer as to money paid to such officer, board, commission, commissioner, department, institute, arm or agency, under protest, and the Treasurer shall place such money in a special fund to be known as the protest fund.

"At the expiration of thirty days from the date of payment the money shall be transferred from the protest fund to the appropriate fund in which it would have been placed had there been payment without protest unless the party making such payment shall have filed a complaint in chancery and secured within such thirty days a temporary injunction restraining the making of such transfer, in which case such payment and such other payments as the court may direct subsequently made under protest by the same person, the transfer of which is restrained by such temporary injunction, shall be held in the protest fund until the final order or decree of the court."

Claimant herein did not obtain any such temporary injunction, but now relies upon the fact that during the time

these payments by the City of Oglesby were being made, there were already suits started by other claimants to restrain the Director of Finance and the State Treasurer from forcing compliance with said Utility Tax Act by which the constitutionality of the Act was being tested. Claimant contends it would have been an unreasonable burden on the City to have spent public funds for the prosecution of any suit or suits to enjoin the payment of the funds thus paid by it into the State Treasury when a similar suit was then pending.

The question of voluntary payments was considered by this court at some length in the case of *Butler Company vs. State*, 9 C. C. R. 503, and therein it was stated (p. 509):

"The question as to when illegal or excessive tax payments may be recovered is the subject of an exhaustive annotation in 64 A. L. R., commencing on page 9. The general rule is set forth on page 10, as follows:

'It is a well-settled rule, in the absence of statute, that the right of a party who has paid a tax, local assessment, or license fee, to recover the same back, depends upon whether or not the payment was involuntary. If the payment was voluntary, it cannot be recovered; if it may be deemed involuntary, a recovery may be had.'

"Under the heading of general rules it is pointed out on page 11 that 'the terms 'voluntary' and 'involuntary' when used with reference to payments of taxes, are not applied in their ordinary sense.'

"Under the heading 'Existence and adequacy of other remedy or relief,' the annotator, on page 54, says:

'There is a conflict in the authorities on the question whether the existence of another remedy or means of relief will render a payment of taxes voluntary, where the taxpayer neglects to avail himself of such remedy.

'It has frequently been held that the compulsion brought to bear upon the taxpayer must, in order to render his payment involuntary, have been of such a nature that he had no other reasonable means of immediate relief from the same, except by making the payment.'

"After citing a long list of cases from different jurisdictions, he proceeds (page 55):

'And according to this line of cases, representing, probably, the weight of authority, where the taxpayer has some other legal remedy or protection against the coercive acts of the collecting officer, he is bound to avail himself thereof, and, if he neglects to do so, and pays the tax, such payment is deemed voluntary.'

"The annotation in 64 A. L. R. 9, is supplemented by a further annotation in 84 A. L. R. 294."

In *Rohde vs. City of Chicago*, 254 Ill. App. 590, the court denied judgment for plaintiff who, for the privilege of operating a beauty parlor, had paid a city license under an ordinance later held invalid. In its opinion therein the court concurred

in the following statement from Dillon on municipal corporations:

"The authorities agree that a payment made under compulsion or duress may be recovered. The application of the rule has not been always uniform. Compulsory payment is primarily a question of fact. No precise rules can be laid down as to what constitutes a compulsory payment."

Claimant cites the case of *Illinois Merchants Trust Co. vs. Harvey*, 335 Ill. 284, in support of its contention for an award. In that case Harvey and others had leased certain real estate on Wabash Avenue in Chicago to Marshall Field. Lessee was required to erect a building thereon not less than eight stories in height. The lease as extended was to operate until 1980. The lease contained a forfeiture provision that unless defaults in the performance of covenants were rectified within sixty days after notice was given, the lessors would have the right to exercise an option to declare the lease terminated. The income tax on the rental was paid by lessors for the years 1914-15, and they in turn demanded of and received such income tax from the lessees. Under a proviso contained in the lease the lessees were to pay "all taxes, water rates, special assessments and all other similar impositions of every kind which should be levied or imposed upon the premises." By reason of an amendment to the Income Tax Law, the lessees refused to reimburse lessor subsequent to the year 1915. On March 9, 1921 lessor notified lessees that they were in default under the terms of the lease for non-payment of the sum of \$8,350.97 for such income tax payments, and that unless payment was made to lessor within sixty days, lessors would exercise their election to terminate such lease. Lessees protested against making the payment but paid, as they stated they could not afford to involve the forfeiture of the lease, as such forfeiture would involve a loss of some \$2,000,000.00. Later a suit in assumpsit for the recovery of the money was filed by lessees. The Supreme Court in considering the question of voluntary payment under compulsion and duress said (p. 291):

"The rule was early laid down in *Elston vs. City of Chicago*, 40 Ill. 514, that a payment made with full knowledge of all the facts and circumstances and in ignorance only of legal rights cannot be recovered; that in order to render a payment compulsory such pressure must be brought to bear upon the person paying as to interfere with the free enjoyment of his rights of person or property, in the sense of depriving him of the exercise of his free will. The rule generally followed in tax cases is, that although the

statute imposing the tax be unconstitutional and the tax illegal, it cannot be recovered if paid voluntarily or under mistake as to legal rights but with knowledge of the facts, where an opportunity is afforded to defeat the tax."

The court then adds:

"From the Illinois cases cited, and those of other jurisdictions, the rule is deducible that where one, to prevent injury to his person, business or property, is compelled to make payment of money which the party demanding has no right to receive and no adequate opportunity is afforded the payor to resist such payment, it is made under duress and can be recovered."

After reviewing a number of cases the court in applying the law to the facts in question said (p. 296):

"We are of the opinion that the forfeiture threatened against defendants in error (the tenant) was cognizable in equity, and that the demand being invalid and the result of a forfeiture being of a serious consequence to defendants in error, equity would have relieved against the same. Defendants in error had sixty days in which to apply for such relief. There was adequate time to secure the aid of equity and that court was open to them. It follows that the payment by them was voluntary and not made under compulsion or duress."

On a rehearing the court re-adopted the foregoing as its conclusions.

The rule as to non-recovery of voluntary payments has been re-affirmed in the recent case of *Groves vs. Farmers State Bank*, 368 Ill. 35, wherein the court said (p. 47):

"Money voluntarily paid under a claim of right to the payment, with full knowledge of all the facts by the person making the payment, and without fraud or mistake of fact, cannot be recovered back upon the ground that the claim was illegal unless the payment was made under circumstances amounting to compulsion."

No distinction in the matter of tax refund can be made in favor of claimant as a municipal corporation, as distinguished from a private enterprise, in regard to payments made under the said Public Utility Tax Act, for said municipal corporation in the operation of the utility was engaged therein in its private capacity and not in its governmental capacity. In considering the question of such distinction the Illinois Supreme Court in the case of the *City of Chicago vs. Ames*, 365 Ill. 529, said:

"The use of the term 'person' in statutory enactments has been held to include municipalities. A municipal corporation selling gas, water or electricity for private consumption does so in its proprietary rather than its governmental capacity. * * * No distinction is to be drawn between such business of selling when indulged in by a municipality and when engaged in by a private corporation. * * * When a municipality goes into the business of furnishing water for sale * * * such municipality does not sell in the capacity of sovereignty but in a private capacity."

Major reliance is placed by claimant upon the fact that in the case of *Benzoline Motor Fuel Company* above referred to (353 Ill. 600), the taxing Act was declared unconstitutional and that the Court of Claims thereafter, in the case of *Benzoline Motor Fuel Company vs. State*, 9 C. C. R. 178, granted an award to claimant therein for the payments previously made by it under protest.

An examination of the latter case will disclose that the Benzoline Motor Fuel Company upon making the payment of tax demanded of it, followed its payment under protest by obtaining a temporary injunction from the Circuit Court of Sangamon County; that the State Treasurer notwithstanding such injunction transferred said fund to the State Treasury, while said injunction proceedings were pending; that the Supreme Court entered a final order directing repayment to the claimant of the sum to which it was entitled.

Thus we see that the Benzoline Motor Fuel Company case is not in point and does not support the contention of claimant herein.

Payment under protest, in order to justify a recovery of funds from the State involves not only due notice of protest at the time of such payment, but requires the further action upon the part of claimant of enjoining the transfer of such money until the legality of such payment can be determined. This provision is an important one as a matter of public policy to the entire financial structure of the State government. It is only by due notice of what funds previously paid to the State officers are tied up by injunction proceedings that the Director of Finance can determine the correct financial status of the State. The fact that some other party had enjoined the transfer of funds collected from it cannot serve the claimant herein as a compliance upon his part with such statutory requirement. In the ordinary payment of taxes by an individual, if two taxpayers should individually file their protest with the County Treasurer at the time such taxes are paid, and one of such taxpayers should thereafter file his objections in the County Court to test the validity of such tax, and the other individual would do nothing but stand by to wait the outcome of the other's suit, he could not recover his taxes regardless of the outcome of the County Court proceedings on the objections filed by such other party.

The statutes provided a full and complete remedy for the claimant herein and it should have taken advantage of the provision of law enacted for its protection. As in the Marshall Field case above quoted, claimant had ample time in which to seek its injunction, and having failed to take advantage of the remedy provided by statute it follows that the payment made by claimant was made voluntarily and without compulsion or duress.

As the complaint fails to show compliance by claimant with those requirements which would warrant an award by this court for a refund of the tax in question, the motion of the Attorney General is allowed and the claim dismissed.

(No. 3387—Claimant awarded \$96.23.)

JOHN T. HAWTHORNE, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 15, 1939.

Claimant, pro se.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

MONEYS ADVANCED FOR USE AND BENEFIT OF STATE—*lapse of appropriation out of which could be paid—before payment—when award may be made for.* Where claimant, as employee of State, expended moneys for use and benefit of State, while in the performance of his duties, and under proper authority, and it clearly appears from the law and the evidence that he should be reimbursed therefor, an award for payment will be made.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant filed his complaint herein on June 10, 1939, and therein requests an award in the sum of \$96.23, which amount he claims is due him for money advanced for traveling expenses. A report of the director of the Department of Conservation concerning the matter has been filed with this court and from the record herein it appears that during the months of February, March and April, 1937, and for more than four years prior thereto the claimant was in the employ of the respondent as Inspector of Game Wardens for the Department of Conservation, and that in addition to his salary he regularly received reimbursement for his traveling expenses. During such months of February, March and April,

1937, while engaged in the performance of the duties of his position, claimant incurred and paid traveling expenses in the amount of \$96.23, but failed to present his expense account therefor to the Department of Conservation until October, 1937, at which time the appropriation out of which the same was properly payable had lapsed. The director of the department reports that the claim represents legitimate expenses incurred by the claimant, and that the reason the department did not voucher the same for payment was because the appropriation had lapsed when the expense account was presented.

A similar question was presented in the case of *Pelikan vs. State*, No. 3144, decided at the March Term, 1938, and we there held that the claimant was entitled to an award. The same conclusion has been announced by this court in numerous cases involving similar principles. See: *Indian Motor Cycle Company vs. State*, 9 C. C. R. 526, and cases there cited. On the facts presented in the instant claim the claimant is clearly entitled to an award. Award is therefore entered in favor of the claimant for the sum of Ninety-six Dollars and Twenty-three Cents (\$96.23).

(No. 2481—Claimant awarded \$13.70.)

BARTONVILLE BUS LINE, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 15, 1939.

Claimant, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN and GLENN A. TREVOR, Assistant Attorneys General, for respondent.

FRANCHISE TAX—paid under mutual mistake of fact—may be recovered. Where a franchise tax has been paid under a mutual mistake of fact, an award for the refund thereof may be made.

MR. JUSTICE LINSKOTT delivered the opinion of the court:

Rehearing having been granted on motion of the respondent, the following is substituted for the original opinion herein.

On January 30, 1934, Peoria Bus Transportation Company, a subsidiary of the claimant herein filed with the Secretary of State, its annual report, upon which it was assessed a franchise tax in the amount of \$13.70, which tax was paid by

claimant on May 22nd, 1934, under the impression that the same covered the preceding calendar year, whereas in fact it covered the year commencing July 1, 1934.

On June 15th, 1934 said Peoria Bus Transportation Company filed in the office of the Secretary of State its statement of intent to dissolve, and on June 26, 1934 Articles of Dissolution were duly filed and certificate of dissolution duly issued by the Secretary of State.

Under the laws then in force the franchise tax was based upon the sum of the stated capital and paid in surplus as of December 31st of the preceding calendar year, less any reduction made prior to June 25th of the current calendar year, as disclosed by any report or document filed by the corporation in office of the Secretary of State, *Cahill's Revised Statutes, 1933 Chap. 22 Par. 132*. Statement of intent to dissolve having been filed on June 15th, 1934, and certificate of dissolution having thereafter been issued pursuant thereto, it would appear that the effective date thereof was the date of filing, to wit June 15th, 1934. Consequently there was no capital and no paid in surplus of the Corporation of June 25th, 1934, and no tax was due from the Corporation for the year commencing July 1, 1934.

All of the assets of said Peoria Bus Transportation Company were, at the time of dissolution thereof, transferred to the claimant herein, which now seeks to recover the amount of the franchise tax so paid as aforesaid.

The Attorney General contends that the tax in question was paid voluntarily, with a knowledge of all the facts, and that under the law as laid down by this court in the case of *Butler Company vs. State*, 9 C. C. R. 503, claimant is not entitled to a refund of the tax so paid as aforesaid.

In the *Butler Company* case, this court said: "Our courts have uniformly held that where an illegal or excessive tax is paid voluntarily, and with a full knowledge of all the facts, it cannot be recovered;" and in the same case we also said: "It is also uniformly held that where such tax is paid under a mistake of fact, it is not considered as having been voluntarily paid, and may therefore be recovered."

In making payment of tax in question, the taxpayer was under the impression that it was paying the tax for the preceding calendar year. As a matter of fact the tax for the preceding calendar year had theretofore been paid, and no

further tax became due from the corporation, as it was dissolved before the next due date.

It is often a difficult matter to distinguish between a mistake of fact and a mistake of law, but as we view the matter, the payment in this case was made under a mistake of fact, and claimant is therefore entitled to an award for the amount paid.

Award is entered in favor of the claimant for the sum of Thirteen and 70/100 (\$13.70) Dollars.

(No. 3303—Claimant awarded \$63.45.)

CITIES SERVICE OIL COMPANY, A CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 15, 1939.

ALLEN, DARLINGTON & MOORE, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

Supplies—lapse of appropriation out of which could be paid—before payment—when award may be made for. The facts in this case are almost identical with those in *Metropolitan Electrical Supply Company vs. State*, No. 3270, *supra*, and the opinion in that case is controlling herein.

Per Curiam:

The claimant, Cities Service Oil Company, a corporation licensed under the laws of the State of Illinois, furnished the St. Charles School for Boys at St. Charles, Illinois, a quantity of oils. The oils were duly ordered and received and the price agreed upon. After delivery, it was discovered that these oils were not fit for the purpose for which they were purchased, but it was also discovered that the St. Charles School for Boys badly needed some oil. The total purchase price of the oil was \$90.00. The State received a credit for the merchandise returned in the sum of \$26.55, which consisted of 50 gals. No. 1191, 53 gals. No. 1145 and tax refund of \$.77.

Apparently some controversy arose over the return, but even though the oils as purchased did not meet the requirements of the St. Charles School for Boys, the school did use the greater portion of the oil. We now find that the amount due the claimant is the sum of \$63.45.

706 SCHOOL DIRECTORS OF DISTRICT NO. 66, COUNTY OF SALINE
AND STATE OF ILLINOIS v. STATE OF ILLINOIS.

In many cases this court has held that where a claimant has rendered services or furnished supplies to the State on the order or request of an official authorized to contract for the same, and submits a bill therefor within a reasonable time, and due to no neglect or fault on the part of claimant, same is not approved and vouchered for payment before the appropriation from which it is payable lapses, an award for the reasonable and customary value of the services or supplies will be made where at the time the expenditure was contracted there were sufficient funds remaining in the appropriation to pay for same.

We, therefore, make an award to the claimant, Cities Service Oil Company, a corporation, in the sum of \$63.45.

(No.3189—Claimant awarded \$1,129.42.)

SCHOOL DIRECTORS OF DISTRICT NO. 66, COUNTY OF SALINE AND STATE OF ILLINOIS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 15, 1939.

LYNNDON M. HANCOCK, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

SCHOOL DIRECTORS—authorized to establish schools for crippled children—excess cost of maintenance over that of schools for normal children—State liable for subject to limitation in law authorizing. Under the Statutes of Illinois School Directors are authorized to establish and maintain classes and schools for crippled children, and the excess cost of the maintenance of such schools over those for normal children, as determined by said directors are a charge against the State, and are to be paid annually to such directors on the warrant of the Auditor of Public Accounts, out of any money in the treasury appropriated for such purpose, provided such excess cost shall not exceed \$300.00 for each crippled child.

SAME—same—same—same—lapse of appropriation—before payment—when award may be made for. Where an appropriation was made to pay the excess cost of education of crippled children, over that of normal children, and School Directors were entitled to payment for an excess amount expended by them in education of crippled children, but before payment thereof such appropriation lapsed an award may be made for amount due, where there was sufficient funds therein to pay same, at time of lapse.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant seeks to recover the sum of \$1,129.42 which it claims is due and owing to it under the terms and provisions

of an Act of the General Assembly of the State of Illinois entitled "An Act to Enable School Directors and Boards of Education to Establish and Maintain Classes and Schools for Crippled Children, and Providing for Payment from State Treasury of the Excess Cost of Maintaining and Operating Such Classes and Schools Over the Cost of Maintaining and Operating Schools for Normal Children," approved June 19th, 1923, as amended. (Illinois Revised Statutes, 1937, Bar Association Edition, Chapter 122, Section 685A et sec.)

Such statute provides, among other things, that the aggregate excess cost of the maintenance of schools for crippled children, as determined, computed and reported by the board of education shall be a charge against the State of Illinois, and that such excess cost shall be paid annually to such board of education on the warrant of the Auditor of Public Accounts out of any money in the treasury appropriated for such purpose, provided that such excess cost shall not exceed \$300.00 for each crippled child.

In addition to its school for normal children, claimant maintained a school for crippled children during the school year July 1, 1936 to June 30, 1937, and its claim in this behalf is for the excess cost of maintaining such school for crippled children for such school year.

On or about June 5th, 1937 claimant made a report to the Department of Public Welfare of the respondent, on blanks furnished by such department, giving detailed information concerning the cost of maintaining the school for normal children and the school for crippled children, and the amount of its claim in connection therewith. The Department of Public Welfare, through its authorized representatives, objected to the report as presented, and wrote to claimant with reference thereto. Subsequent thereto there was further correspondence regarding the claim, several conferences between the interested parties, as well as several audits of the books and records of the claimant.

The record discloses that there were numerous errors in the bill of particulars attached to the original complaint herein, as well as in the several preliminary audits made at the suggestion of the welfare department of the respondent. Pending a determination of the correct amount due claimant, the respondent paid to said claimant the sum of \$1,156.43 to apply on account. A final audit was made by Weldon Neun-

reiter, traveling auditor of respondent, under date of May 5th, 1939, from which the following facts appear:—

1. That the total cost of maintenance of claimant's school for normal children for the aforementioned school year was \$6,992.99; that the average monthly enrollment of normal children was 201; that the average cost per normal child for said school year was \$34.79.

2. That the total cost of maintenance of claimant's school for crippled children for said school year was \$2,887.72; that the average monthly enrollment of crippled children was 17.3; that the average cost per crippled child for said school year was \$166.92.

Deducting the average cost per normal child from the average cost per crippled child leaves an excess cost of \$132.13 per crippled child. Upon that basis the total excess cost for the maintenance of the school for crippled children for the said school year was \$2,285.85.

Deducting the sum of \$1,156.43 heretofore paid by respondent, leaves a balance of \$1,129.42, which amount is due to claimant under the provisions of the aforementioned Act.

The appropriation made by the 59th General Assembly for State aid to cover the excess cost of education for crippled children in the public schools lapsed September 30th, 1937. At that time there was an unexpended balance in such appropriation of \$20,070.71, being greatly in excess of the amount of this claim.

Award is therefore entered in favor of the claimant for the sum of Eleven Hundred Twenty-nine Dollars and Forty-two Cents (\$1,129.42).

(No. 2403—Claimant awarded \$4,799.97.)

PETER J. CROWLEY COMPANY, A CORPORATION. Claimant. vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 15, 1939.

TAYLOR, MILLER, BUSCH & BOYDEN, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

CONTRACTS—specifications forming part of—erroneous statements in—when award may be made for extra work resulting from. Where erroneous statements are contained in specifications prepared by owner, forming part of

construction contract, between owner and builder, and builder relies on same and is misled thereby, and as a result thereof, is obliged, in performance of contract to do extra work, owner is liable in damages for value thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein seeks an award of \$11,580.54, together with interest thereon at five (5) per cent per annum from the 28th day of November, 1932, said sum representing the alleged cost, over and above the contract price, which claimant incurred in the replacement of peat in the construction of 6.939 miles of S. B. 1. Route No. 53 in Cook and DuPage counties. The contract in question was made in April, 1932, and under the terms thereof there was incorporated therein the Notice to Contractors, Special Provisions, Proposal, Contract Bond, Plans, and the Standard Specifications for Road and Bridge Construction adopted by the Department of Public Works & Buildings under date of January 2, 1932.

The record discloses that prior to the proposal and contract in question, respondent had on several other occasions requested bids for the construction of the section involved. In the first request for bids in May, 1931 the amount of peat replacement was approximated at 75,500 cubic yards. In August and September of 1931 bids were again requested and peat replacement was approximated at 2,500 cubic yards. The change in the estimated amount of peat replacement was due to a proposed line change in the route in order that certain peat deposits might be eliminated. The original plans indicated peat between Stations 141+00 and 152+00 at a maximum depth of $24\frac{1}{2}$ feet; also between Stations 213+00 and 214+00 of a maximum depth of 5 feet. After claimant's bid was accepted and the formal contract executed a line change was made which eliminated the peat between the first two stations.

In April, 1932 claimant commenced excavation on the project as relocated, and encountered peat between Stations 213+00 and 214+00 reaching a maximum depth of 11 feet, and of a maximum depth between Stations 152+00 and 155+50 of 27 feet. Claimant notified respondent of the increased quantity of peat found and was instructed to proceed to remove same. The total amount of peat replacement on the project turned out to be 22,857 cubic yards instead of 2,500 cubic yards as approximated at the time claimant submitted his final bid.

Respondent has paid claimant for the entire 22,857 cubic yards of peat replacement at the contract price of 74c per cubic yard.

Claimant has heretofore been paid \$198,523.61 and now seeks as extra compensation the difference between the amount received for the replacement of the 22,857 cubic yards of peat at 74c per cubic yard (\$16,914.18) and the amount which it represents the costs to have been of extra excavating of the additional amount of peat found. The work of removing the peat was done under an arrangement between claimant and the Thomas McQueen Company under which the latter agreed to remove the 2,500 cubic yards at 74c per cubic yard and the balance of the 22,857 cubic yards to be paid for on the following basis:

1. The cost of the labor furnished.
2. Rental for equipment used. (Computed under Holoway schedule.)
3. Premiums on compensation insurance on employees on project.
4. Materials furnished.
5. Fifteen per cent on labor and materials for overhead and profit.

Respondent contends that acceptance by claimant of the last payment on the contract in chief operated as a release for all claims under the contract or for anything done or furnished in connection therewith. Respondent also contends that under the provisions of Article 4.3 of the Standard Specifications it had the advantage of calling for peat replacement in excess of the estimated 2,500 cubic yards, and that its liability of payment therefor would be at the contract price of 74c per cubic yard, providing the total amount of peat replacement did not exceed twenty-five (25) per cent of the amount of the entire contract; that the increase in this item to 22,857 cubic yards at 74c equals \$16,914.18, which latter amount is not in excess of twenty-five (25) per cent of the entire amount of the contract, \$198,523.61; that as claimant has been paid the said amount of \$16,914.18 it has received the full amount due under its contract and is not entitled to an award.

Respondent also contends that the estimated quantity of peat replacement was not in the nature of a guaranty or warranty and that claimant was obligated to remove the additional amount of peat at the contract price.

We cannot agree with the contentions urged by the Attorney General in behalf of respondent. There is a radical

difference not only in the amount of work but in the manner in which the labor must be performed, and of the machinery used, in the removal of peat at a depth of 24 feet to 27 feet. When the State changed its advertisement for bids and called attention to the fact that it was eliminating the replacement of peat at a low depth and in a large quantity, the bidder was justified in replying upon the belief that the State had definitely determined the conditions and had found that there would be a comparatively small amount of peat at a slight depth. This is true to a much greater degree than if there had merely been one estimate made, and the variance had thereafter appeared. As stated by Justice Brandeis in the case of *United States vs. Spearin*, 248 U. S. 132—

"The responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans and to inform themselves of the requirements of the work * * * where it appears that the contractor was misled by erroneous statements in the specifications."

In the case of *Sartoris vs. Utah Construction Company*, 21 Federal (2d) 1, the specifications indicated solid and loose rock. When the plaintiff started work he found there was a formation of unusually fine loose sand, which greatly increased the cost of his excavation and construction work. The court there said:

"As we read the language, it was equivalent to saying to prospective bidders or contractors. 'You may bid in the expectation,' or 'in submitting your bids and in contracting, you may assume, that part of the tunnel excavation will be in earth formation and the remainder will be in solid rock, with possibly a short distance in loose rock, or a combination of all three; and by referring to the accompanying drawings you will see that the design is suited to such, and only such, a formation.' So read, it constituted a warranty."

In the above case the court held that the plaintiff was entitled to recover for the extra work. Respondent attempts to distinguish the *Sartoris* case by insisting that in the case at bar claimant did not encounter a material, different from that provided for in the contract. We believe that the changes which he did encounter were as material as those in the *Sartoris* case.

Claimants' Exhibit 1-B is a letter from the Division of Highways under date of August 19, 1931 in which the then Engineer of Design stated to claimant—

"Since sending out proposals (for the work in question) an error was discovered in the schedule of prices. The item of peat replacement under

this schedule was listed as 75,500 cubic yards. The correct quantity for this item is 2,500 cubic yards. Will you therefore, kindly correct the quantity of peat replacement listed in the schedule of price in the copy of the proposal which was sent to you?"

The record shows that when claimant was thus informed it relied on the representation made. From a stipulation filed herein it appears that claimant had made a bid in answer to the request therefor under date of May 12, 1931, wherein the peat replacement was estimated at 75,500 cubic yards, and in that bid claimant listed the peat replacement at 95c per cubic yard. Pursuant to the above notice and change claimant reduced its unit bid price from 95c per cubic yard to 74c per cubic yard. It also appears by the stipulation that the old plans showed peat between Stations 141 and 152 reaching a maximum of 24½ feet in depth; that peat between Stations 152 and 155½ on the relocated line actually reached a maximum depth of 27 feet.

Claimant contends that it should be compensated for the additional cost of peat replacement and that the amount should be the actual sum which it was required to actually pay in order to remove the peat in the extra quantity and at greater the depth encountered; that the amount of the claim submitted is the actual cost which it so incurred.

As above stated, we recognize that the removal of peat at a great depth is more costly per cubic yard than would be the removal of same near the surface. The cost per cubic yard is greater for many reasons as shown by the record herein. No better guide as to the computation of such difference can be found than the bids and prices quoted by claimant itself. When it expected to encounter 75,500 cubic yards at a depth of 24 feet it made a bid of 95c per cubic yard for peat replacement. When it was informed that the amount would be 2,500 cubic yards at an approximate depth of 5 feet it reduced its bid to 74c per cubic yard. The amount actually encountered was 22,857 cubic yards and the depth varied from 5 feet to a maximum of 27 feet.

The difference in the price bid by claimant is 21c per cubic yard. The additional amount of 22,857 cubic yards at 21c per cubic yard amounts to \$4,799.97. This computation does not eliminate the 2,500 cubic yards for which claimant was willing to bid 74c, for we believe the price of 95c per cubic yard should, from the evidence, be the correct price on the

total quantity. We accordingly find that claimant is entitled to the additional sum of \$4,799.97 in full payment of additional work encountered as hereinabove set forth.

An award is therefore hereby made in favor of claimant for the sum of \$4,799.97.

(No. 2935—Claim denied.)

ANNA TULL, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 21, 1939.

R. I. DOVE, Attorney for claimant.

OTTO KEBNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—lump sum settlement. under Section 9 of —only when for best interests of the parties—parties includes employer. Where there has been an award for compensation made under the Workmen's Compensation Act, payable in weekly installments, payment of such compensation in a lump sum, by virtue of Section 9 of the Act is only authorized when it is shown that such payment is for the best interests of the parties, and in the use of the word parties, the employer is included and the interests of said employer are to be considered, as well as those of the employee, or his dependents.

SAME—same—when petition for by widow without children for must be denied. Section 9 of Workmen's Compensation Act, providing for payment of compensation in a lump sum, is not applicable where award is to widow without children, as such award is uncertain and contingent in its duration and amount, subject to being extinguished by the death or remarriage of such widow, and it cannot be said that a lump sum settlement is for best interests of the employer and a petition for such settlement by widow must be denied.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Above case again comes before the court pursuant to a petition for lump sum settlement in accordance with the provisions of Section Nine (9) of the Workmen's Compensation Act.

On October 14th, 1936 award was entered in favor of the claimant for the sum of Thirty-three Hundred Ninety-eight Dollars and Sixty Cents (\$3,398.60) payable in Four Hundred Fifteen (415) weekly installments of Eight Dollars and Seventeen Cents (\$8.17) commencing May 17th, A. D. 1936, and one

final payment of Eight Dollars and Five Cents (\$8.05). *Tull vs. State*, 9 C. C. R. 308.

Claimant now asks for a lump sum payment of One Thousand Dollars (\$1,000.00), in order that she may pay the balance due on her home, the balance due on the funeral expenses of her husband, and a number of small outstanding accounts.

Mr. M. K. Lingle, engineer of claims of the respondent, has filed herein a report, from which it appears that it is to the best interest of the petitioner that the prayer of the petition be granted.

The question as to whether the provisions of the Workmen's Compensation Act relative to lump sum payments apply to cases in which the facts are similar to the facts in the present case, was considered by our Supreme Court in the case of *Illinois Zinc Co. vs. Ind. Com.*, 366 Ill. 480. In that case, as in this, the deceased employee left him surviving his widow and no child or children whom he was under legal obligation to support at the time of his injury. The Supreme Court in that case pointed out that the provisions of Section Nine (9) of the Workmen's Compensation Act have reference to a commutation of the "compensation, or any unpaid part thereof," and authorize the payment of a lump sum only when it is for the "best interests of the parties;" that under the provisions of Section 7a and Section 21 of the Workmen's Compensation Act, the right to receive compensation would be extinguished by the remarriage or death of the widow; that although it might be for the best interests of the widow, it certainly could not be for the best interests of the employer to allow a lump sum; and in that connection the court said:

"The award in this case was not for a definite sum of money payable at all events over a definite period of years and months but was contingent in its nature. It was, in legal effect, an award that if the widow should live so long and should remain unmarried she should have and receive the specified payments at the specified intervals, not exceeding, in all, the sum of \$4,000.00. This measured the extent of the employer's liability to pay and it cannot be said that when this petition was filed under Section 9 of the Workmen's Compensation Act, there was any certain sum which could be described as 'such compensation or any unpaid part thereof.' Neither can it be said that this kind of an order is to the best interest of the parties. It might or might not be to the best interest of the surviving widow, but it clearly could not be in the interest of the objecting employer, and the section is only applicable where it is shown or admitted to be to the best interest of both parties.

"It is our opinion that Section 9 is not applicable to an award such as this, which is uncertain and contingent in its duration and amount. To hold otherwise would be to deprive the employer of due process of law and the equal protection of the law and would render the entire section unconstitutional. A commutation of the last 102 weeks of compensation in this case would be as absurd from a legal standpoint, as if the Governor should attempt to commute the last one-half or one-third of a life sentence."

Under the law as laid down by our Supreme Court in the Illinois Zinc Company case, we have no authority to order a lump sum payment under the facts in this case, and claimant's petition therefore must be denied.

(No. 2741—Claimant awarded \$1,600.00.)

WALTER VOLLAND, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 15, 1939.

Rehearing denied August 16, 1939.

~~SERVICES—salary for—when award may be made for.~~ Where it appears that claimant rendered services to the State, which were accepted by it, at the request of one not shown to have authority to employ him, but that Director of Department wherein said employee rendered same, had knowledge of his employment therein, and there is no denial that said services were rendered, nor any question raised as to same not being satisfactory an award for the reasonable value of same may be made.

WILLIS MELVILLE, Attorney for claimant.

OTTO KERNER, Attorney General and GLENN A. TREVOR Assistant Attorney General, for respondent.

MR. JUSTICE LINSBOTT delivered the opinion of the court:

The claimant, Walter Volland alleges in his complaint that on the 2nd day of December, 1933, he was employed by one Edward Formanek who was then Superintendent of the Cicero Branch of the Illinois State Employment Service and upon the acts, representations, directions and requests of said Formanek, he performed his services in the capacity of file and re-write clerk in the Cicero Branch of the agency that he was to receive as compensation therefor and as an employee of the Department of Labor the sum of \$25.00 per week. It is further alleged that four weeks later the weekly salary was adjusted to the sum of \$24.00 per week and that commencing December 2, 1933, claimant did perform and complete the duties of a file and re-write clerk, from the last mentioned date

to January 1, 1934 at the rate of \$25.00 per week and for a period of 62 weeks and three days from February 15, 1934 to May 1, 1935 for the sum of \$24.00 per week, and in this manner having earned the sum of \$1,600.00 for which he received nothing.

The Attorney General contends that the Superintendent Formanek had no power or authority to employ this man. It is admitted that he fully and faithfully performed all the duties of the position at the time alleged. The State provided him with a place in which to work and his Superintendent directed him what to do. The evidence shows similar employment.

The State, having created a set of circumstances commonly called temporary employment, and accepted Volland's services with full information and knowledge of all material facts, asks why Volland continued to act without compensation in due course. He needed the employment and stated that he had requested pay on numerous occasions and was always advised that it would be forthcoming. It appears in the evidence that Dr. Atwood, the Director of the employment service, had frequently seen this claimant on the job.

We feel that he earned the compensation he asked for and that at all times his conduct was fair and reasonable.

We therefore make an award in the sum of Sixteen Hundred (\$1,600.00) Dollars in favor of Walter Volland.

(No. 3018—Claimant awarded \$2,740.38.)

CITY OF JACKSONVILLE, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 14, 1939.

Rehearing denied August 16, 1939.

E. W. CLEARY, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

SUPPLIES AND SERVICES—*lapse of appropriation out of which could be paid—before payment—when award for value of may be made.* Where it appears that State in pursuance of agreement with Municipality and in accordance with previous course of dealings between them, undertook and agreed to pay a proportionate part of the operating costs of a sewage treatment plant, operated by the City, in which sewage of State institutions discharged their sewage, and Municipality presents bill therefor amount of which is undis-

puted, within a reasonable time, but appropriation out of which same could be paid lapses before payment thereof, an award may be made for amount, when it is shown that at the time obligation was contracted there were sufficient funds in appropriation to pay for same.

Per Curiam:

The claim was filed by the city of Jacksonville on October 26, 1936 and alleges that during the year ending June 30th, 1935, the city of Jacksonville permitted the State of Illinois to discharge sewage from the Illinois State School for the Deaf, the Illinois State School for the Blind and the Jacksonville State Hospital, all located in the City of Jacksonville, into the two sewage treatment plants operated by the City of Jacksonville; that according to an agreement previously entered into and according to a previous course of dealings which had been established between the parties with reference thereto, the State of Illinois should have paid to the claimant such proportionate share of operating the costs of said plants as the population of said institutions bears to the general population served by the said plants respectively; that consequently the respondent is indebted to claimant in the amount of \$422.16 for its proportionate share of the operating costs of the North Side Sewage Treatment Plant applicable to the Illinois State School for the Deaf in accordance with its just proportion; and it is also charged that the State is indebted to the City of Jacksonville in the amount of \$2,201.18 for its proportionate share of the operating costs of the South Side Sewage Treatment Plant applicable to Jacksonville State Hospital and in the amount of \$172.21 as its proportionate share of the operating costs of the South Side Sewage Treatment Plant applicable to the Illinois State School for the Blind, all of which is particularly set forth in the Bill of Particulars attached to the complaint. It appears that the City had presented the aforesaid claims to the Managing officers of the respective Institutions above mentioned and the said officers in turn referred the matter to the State Department of Public Welfare; that Dr. G. C. Brown, Managing Officer of the Jacksonville State Hospital in turn received from the Fiscal Supervisor of the Department of Public Welfare a certain letter stating that the appropriation from which said claims should have been paid had been exhausted and that it would be necessary to file such claims in the Court of Claims. It appears

from the record that the 56th General Assembly of the State of Illinois in 1929 appropriated to the Department of Purchases and Construction the sum of \$212,237.98 or so much thereof as was necessary to pay the State's proportionate share of the estimated cost of said Sewage District Projects for the City of Jacksonville, and the 56th General Assembly also made appropriations of \$7,000.00 to pay the State's proportionate share of the cost of operation of said plant to September 1, 1931; and it appears by stipulation made on behalf of the Attorney General and the City Attorney of the City of Jacksonville that since the establishment of said sewage treatment plants during the year 1930 and continuously down to the present time, the City of Jacksonville has permitted the sewage from the Illinois School for the Deaf to flow into the North Side Sewage Treatment Plant and the sewage from the Illinois School for the Blind and the Jacksonville State Hospital to flow into said South Side Sewage Treatment Plant and such sewage has been treated the same as other sewage in the City of Jacksonville and that in each instance the State of Illinois was charged for the respective Institutions a proportionate share of the cost of operating the Plant serving the respective Institutions for each year in question, this proportion having been based upon the average of the percentage which the population of the respective Institutions bore to the population of the entire district served by the respective Plants, and the percentage that the sewage flow of the respective Institutions bore to the sewage flow of the district served by the respective plants. In each instance the several amounts charged for the respective Institutions for the several years subsequent to the construction of the plants were paid by the State except for the year ending June 30, 1935, for which year no statement was rendered by the city, until after the lapsing of available appropriations. It also appears by stipulation that the reports of the Auditor of Public Accounts show that on September 30, 1935 there remained unexpended in the Appropriation made to the Department of Public Welfare for the Biennium ending June 30, 1935, more than \$2,740.38 which is the total of the three items, for which payment is hereby sought.

"Where claimant has rendered services or furnished supplies to the State on the order or request of an official authorized to contract for the same, and submits a bill therefor within a reasonable time, and due to no

neglect or fault on the part of claimant, same is not approved and vouchered for payment before the appropriation from which it is payable lapses, an award for the reasonable and customary value of the services or supplies will be made where at the time the expenditure was contracted there were sufficient funds remaining in the appropriation to pay for same."

Indian Motorcycle Co., etc. vs. State, 9 C. C. R. 527.

In this case the amount involved is not disputed and it is admitted that the service was rendered as set forth in the complaint herein. We therefore make an award in favor of the City of Jacksonville in the sum of Two Thousand Seven Hundred Forty and 38/100 (\$2,740.38) Dollars in payment of the State's just proportion for the treatment of sewage at the City of Jacksonville for the said Institutions, namely, Jacksonville State Hospital, Illinois School for the Deaf and Illinois School for the Blind for the year of 1935.

(No. 2689—Claimant awarded \$223.19.)

CHICAGO PARK DISTRICT, A BODY POLITIC AND CORPORATE, Claimant,
vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 15, 1939.

Rehearing denied November 1, 1939.

JAMES M. SLATTERY, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR,
Assistant Attorney General, for respondent.

MUNICIPAL CORPORATION—*expenses incurred in carrying out grant to State—under agreement by State to pay for—when claimant not deemed guilty of laches—when award may be made for.* Where a Municipal corporation made certain beneficial grants to the State, which were received by it, and the corporation in carrying out the grant was put to certain expenses which had been agreed upon by the State, through its proper officials, an award for the amount thereof may be made, even after the lapse of the appropriation out of which same could be paid, as the rule of laches should not apply to public bodies, whose membership is subject to change.

Per Curiam:

The complaint in this case was filed June 19, 1935, and charges that claimant is a body politic and corporate and that pursuant to the provisions of "An Act in relation to the creation maintenance, operation and improvement of the Chicago Park District" (approved July 10, 1933, in force May 1, 1934) it became vested in and to the choses in action of the South

Park Commissioners, a body politic and corporate; and the South Park Commissioners on the thirty-first day of December, 1930, granted a permit to the State of Illinois, Division of Architecture and Engineering, which permit was attached to and made apart of the complaint as Exhibit "A"; that pursuant to the terms of this permit, the State of Illinois had the right to construct six driveway entrances from Cottage Grove Avenue to the building of the 124th Field Artillery Armory in the northeasterly corner of Washington Park as shown on drawings: Plat plan sidewalk layout, Sheet 31 and Revised Memorial Square and Terrace Layout, dated November 14, 1930, submitted to the commissioners. The most northerly of these driveways was to be extended to the west across the north front of the building and connected with the existing park driveway, said driveway to be proper drainage inlets connected to the existing sewers in the manner approved by the commissioners. It was also provided that trees, electric light posts and other fixtures or appurtenances belonging to the commissioners shall be removed at the expense of the grantee wherever said fixtures or appurtenances fall within the lines of said driveways. The actual work, however, of the removal of electric light posts, etc. and such trees as can be replanted to be done by the park forces and the cost thereof charged to the grantee. The electric duct transmitting current and supplying the lights of the commissioners exists in the space between the curb and the sidewalk, and said conduit and the cables contained therein were to be carefully protected by the grantee in the manner provided in the permit.

It is stipulated that the State proceeded and did receive the grant and that it was necessary to make certain changes in the lighting system, remove and relocate cables and conduits and do other work as provided for in said permit, and that the South Park Commissioners did make certain changes in the lighting system to remove and relocate cables and conduits, and to do other work.

The following is an itemized statement of the work done by the South Park Commissioners in connection with the aforesaid permit agreement hereinabove referred to:

124th Field Artillery Bldg., Washington Park, Chicago.
To construct six driveway entrances.

Expense incurred by the South Park Commissioners in connection with change in lighting system necessitated by driveway changes to remove and relocate cables and conduits:

| | |
|--|----------|
| Labor, Mechanical and Electrical Division..... | \$150.37 |
| Labor, Maintenance and Repair..... | 10.14 |
| Materials from South Park Stores..... | 11.06 |
| | <hr/> |
| | \$171.59 |
| 15% Overhead and Supervision..... | 25.74 |
| Electrical Maintenance Expense..... | 10.84 |
| Paving Equipment Expense..... | 1.03 |
| Auto Trucking Expense..... | 13.99 |
| | <hr/> |
| Total | \$223.19 |

Claimant alleges that there is due the Chicago Park District from the State of Illinois, the sum of \$223.19 for the work done by said South Park Commissioners under said permit. The payment has never been made. Claim was presented to the State of Illinois, Division of Architecture and Engineering, and the Adjutant General on the 12th day of September, 1934.

All of these facts appear by stipulation.

The Attorney General opposes the payment of this bill because there was laches in presenting the bill for payment.

It appears from the stipulation that the claimant herein is a public body. While it is the rule that an award will not be made where the claimant is guilty of laches and an appropriation is allowed to lapse, we are of the opinion that where a public body has made certain beneficial grants to the State of Illinois, which have been received, and the public body in carrying out the grant was put to certain expenses which had been agreed to by the proper officials of the State, and because public bodies are subject to change and the contracting members of such public bodies become different individuals, the rule of laches should not apply. It is admitted that the expenditures were made, that the State received the benefits and that the charges were fair and reasonable.

We, therefore, make an award in favor of the Chicago Park District, in the sum of \$223.19.

OPINION ON REHEARING.

A Petition for Rehearing has been filed by respondent in the above entitled cause, and it is urged as grounds for a

rehearing that the claimant was guilty of laches, and that the appropriation from which the money was payable, was exhausted. This was given consideration in the original opinion and because the Chicago Park District, etc. is a municipal body, we held that the defense of laches did not apply. The reason for this is that the heads of municipal bodies, whose duties might require them to act promptly in certain instances, are frequently changed, through no fault of the municipal body. It would, therefore, be an injustice to such municipal body, to hold it strictly to the doctrine of laches.

It is a familiar doctrine that, apart from any question of statutory limitation, courts of equity will discourage laches and delay in the enforcement of rights. The general principle is that nothing can call forth the court of chancery into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive and does nothing. The doctrine is founded principally on the equity maxims, "he who seeks equity must do equity," "he who comes into equity must come with clean hands," and "the laws serve the vigilant, and not those who sleep over their rights," and is based on consideration of public policy. Its object is in general to exact of the claimant fair dealing with his adversary, and the rule was adopted largely because after great lapse of time, from death of parties, loss of papers, death of witnesses, change of title, intervention of equities, or other causes there is danger of doing injustice, and there can be no longer a safe determination of the controversy.

The same rule it would seem, would apply to the other defenses.

The Chicago Park District, being a municipal body, we hold does not come within the rule. The motion for a rehearing is, therefore, denied.

CASES IN WHICH ORDERS OF DISMISSAL WERE ENTERED WITHOUT OPINION

- No. 1783. Book vs. State,
- No. 1830. Copeland vs. State,
- No. 1906. Witke vs. State,
- No. 1996. Kirkham vs. State,
- No. 1998. Kirkham vs. State,
- No. 2168. Goshko vs. State,
- No. 2169. Sample vs. State,
- No. 2282. Jansen & Schaefer vs. State,
- No. 2321. Dyer vs. State,
- No. 2336. The Strandberg Company vs. State,
- No. 2338. Andrew Ward & Sons vs. State,
- No. 2361. Hitchcock vs. State,
- No. 2367. Humphrey vs. State,
- No. 2393. Cole vs. State,
- No. 2402. Indiana Road Paving Co. vs. State,
- No. 2487. Diltmore vs. State,
- No. 2490. McWethy, Admr. vs. State,
- No. 2510. Chapman vs. State,
- No. 2514. Folk vs. State,
- No. 2516. Dunbar vs. State,
- No. 2536. Worthey vs. State,
- No. 2539. Bacoulls vs. State,
- No. 2541. Jenkins, Admx. vs. State,
- No. 2543. Seelye vs. State,
- No. 2545. Colclasure vs. State,
- No. 2554. Disko, Admr. vs. State,
- No. 2575. Lynch vs. State,
- No. 2589. McElroy vs. State,
- No. 2599. Vandermyde vs. State,
- No. 2605. Tobin vs. State,
- No. 2621. Jones vs. State,
- No. 2623. Baird vs. State,
- No. 2628. Madison Construction Co. vs. State,
- No. 2652. DeCosta vs. State,
- No. 2664. City of Blue Island vs. State,
- No. 2667. Allen vs. State,
- No. 2674. Lock vs. State,
- No. 2675. John Mackler & Company vs. State,
- No. 2683. Wilson vs. State,

- No. 2688. Gaines vs. State,
- No. 2691. Denman vs. State,
- No. 2693. Peterson vs. State,
- No. 2699. Milan vs. State,
- No. 2708. Rice et al vs. State,
- No. 2712. Colby vs. State,
- No. 2718. Smith vs. State,
- No. 2720. Fletcher vs. State,
- No. 2722. Milke vs. State,
- No. 2723. Robison vs. State,
- No. 2726. Martin vs. State,
- No. 2738. Cimral etc vs. State,
- No. 2739. Bailey vs. State,
- No. 2744. Steelman vs. State,
- No. 2762. Boyers vs. State,
- No. 2775. Rau vs. State,
- No. 2811. Scott etc. vs. State,
- No. 2814. Ellis vs. State,
- No. 2815. Ramp vs. State,
- No. 2818. Harrison etc. vs. State,
- No. 2832. Alden, etc. vs. State,
- No. 2834. Coonrod etc. vs. State,
- No. 2836. Rusch etc. vs. State,
- No. 2841. Day etc. vs. State,
- No. 2852. Adair etc. vs. State,
- No. 2855. Beer vs. State,
- No. 2856. Cook etc. vs. State,
- No. 2866. Wright etc. vs. State,
- No. 2867. Day etc. vs. State,
- No. 2871. Zamogski vs. State,
- No. 2878. Liberty etc. vs. State,
- No. 2891. Street vs. State,
- No. 2896. Sonnenschein vs. State,
- No. 2902. Long vs. State,
- No. 2903. Maton vs. State,
- No. 2908. City of Rockford vs. State,
- No. 2959. Aldrich Construction Co. vs. State,
- No. 2960. Aldrich Construction Co. vs. State,
- No. 2961. Aldrich Construction Co. vs. State,
- No. 2962. Aldrich Construction Co. vs. State,
- No. 3011. Roland vs. State,
- No. 3040. Sneed, etc. vs. State,
- No. 3067. Albright, etc. vs. State,
- No. 3085. Alton Railroad Company vs. State,
- No. 3103. Moore vs. State,
- No. 3112. Krowka vs. State,
- No. 3117. Cropley vs. State,
- No. 3136. Mills vs. State,
- No. 3143. General Fiber Company vs. State,
- No. 3145. City of Highland Park vs. State,

- No. 3161. Dahlheimer vs. State,
- No. 3172. Schwing vs. State,
- No. 3180. Roberts etc. vs. State,
- No. 3181. Roberts, etc. vs. State,
- No. 3182. Roberts, etc. vs. State,
- No. 3207. Snyder vs. State,
- No. 3212. Broadway vs. State,
- No. 3217. Muelhoffer vs. State,
- No. 3222. Krauspe vs. State,
- No. 3225. Adler vs. State,
- No. 3226. Iseminger vs. State,
- No. 3231. Welland vs. State,
- No. 3239. Ringa vs. State,
- No. 3240. Taylor vs. State,
- No. 3241. Zimmerman vs. State,
- No. 3242. Drake Braithwaite Co. vs. State,
- No. 3252. Martin vs. State,
- No. 3253. Courtney vs. State,
- No. 3254. McGinnis, etc. vs. State,
- No. 3256. Frerker, etc. vs. State,
- No. 3257. Cody & Son, etc. vs. State,
- No. 3259. Norris, etc. vs. State,
- No. 3260. Bisch, etc. vs. State,
- No. 3264. Chambers vs. State,
- No. 3265. Barto vs. State,
- No. 3266. Adams vs. State,
- No. 3267. Johnson vs. State,
- No. 3272. Duffy vs. State,
- No. 3282. Baer vs. State,
- No. 3283. Baer vs. State,
- No. 3284. Lahey's Funeral Home vs. State,
- No. 3285. Klunk vs. State,
- No. 3286. Mercer, etc. vs. State,
- No. 3316. Fern, etc. vs. State,
- No. 3343. Rubinelli Rocca vs. State.

ADVISORY OPINIONS FURNISHED BY COURT OF CLAIMS UPON REQUEST OF ILLINOIS EMERGENCY RELIEF COMMISSION

The Illinois Emergency Relief Commission having requested the Court of Claims for advice concerning certain claims made against it by employees for compensation for accidental injuries, the court in compliance with said request furnished the following advisory opinions, based upon the facts submitted and set forth in each of the matters hereinafter set forth.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 3. Payment of \$109.00 Advised.

M. PAULINE ORR, Claimant vs. ILLINOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed December 14, 1937.

SUPPLEMENTAL ADVISORY OPINION BY MR. JUSTICE YANTIS.

To the Illinois Emergency Relief Commission:

Following the rendition of an Advisory Opinion heretofore rendered by this court in the above entitled matter on or about the 14th day of January, A. D. 1937, wherein a settlement for \$109.00 by the Illinois Emergency Relief Commission with claimant was approved, there was filed with the Clerk of this Court an Amended Statement of Facts, wherein it appears that the original Statement submitted was erroneous in that it stated that the medical, dental and hospital bills incurred by claimant had been paid. Contrary thereto, it appears that subsequent to the rendering of such Opinion, the claimant has become a voluntary bankrupt, and in the Schedules in Bankruptcy filed by claimant, she included such medical, dental and hospital bills as unpaid debts owing by her.

In the Supplemental Statement now filed, it is suggested that payment of the amount of the award heretofore rendered would therefore have to be made to her Trustee in Bank-

ruptcy, and if so made that the award would not discharge or pay the medical, dental and hospital bills in question as contemplated by Section 8, Sub-section (a) of the Workmen's Compensation Act.

WHEREFORE, a Supplemental Opinion is asked of this court as to the propriety of paying the said sum of One Hundred Nine (\$109.00) Dollars heretofore awarded, and if to be paid, with whom should settlement be made.

Section 21 of the Workmen's Compensation Act provides as follows:

"No payment, claim, award or decision under this Act shall be assignable or subject to any lien, or garnishment, or be held liable in any way for any lien, debt, penalty or damages."

Based upon the statements submitted herein, and under the law pertaining thereto, the court is of the opinion that the award heretofore made to claimant in the sum of One Hundred Nine (\$109.00) Dollars for medical, dental and hospital bills is not subject to lien, and that such award is not payable to Claimant's Trustee in Bankruptcy, and the Illinois Emergency Relief Commission is authorized to pay to claimant for the use of the several persons and institutions furnishing such medical, dental and hospital service, the said sum of One Hundred Nine (\$109.00) Dollars. As such payments are for the specific purposes set forth, receipts should be obtained from the individuals and institutions furnishing such medical, dental and hospital service.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 21.

Settlement of claim for \$354.00 justified and found advisable.

THE TRUST COMPANY OF CHICAGO, A CORPORATION, ADMINISTRATOR OF
THE ESTATE OF EDWARD V. CHAPMAN, DEC'D., Claimant vs. ILLI-
NOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed December 16, 1937.

STATEMENT OF FACTS.

The Trust Company of Chicago, a corporation, Administrator of the Estate of Edward V. Chapman, deceased, 33 North LaSalle Street, Chicago, Illinois, claims that Edward V. Chapman sustained an injury on the 11th day of June,

1934, to his left heel and ankle while working for the Illinois Emergency Relief Commission as a maintenance man on Project S1-B4-398. Said project was maintenance and construction work which provided for personnel for maintenance and construction department at headquarters of the Illinois Emergency Relief Commission, 1319 South Michigan Avenue, Chicago, Illinois, and at the Chase Park Relief Office, 4410 Ravenswood Avenue, Chicago, Illinois. Said department took care of alteration and repair work for the following relief agencies: Main office at 1319 South Michigan Avenue, Chicago, Illinois; Personnel office at 1222 South Michigan Avenue, Chicago, Illinois; Unemployment Relief Service in Cook County; Cook County Bureau of Public Welfare in Cook County; Shelters in Cook County; Transient Homes in Cook County; Mattress and Comforters Factory; Tool Department in Cook County; Warehouses in Cook County; furniture in all relief offices in the State; also the building of furniture for nursery schools. Said project was instituted on or about the 13th day of April, 1934, and was completed on or about the 17th day of September, 1934. The total cost of said project was \$401,917.60. Said amount included labor and materials. All monies for said project were furnished by the Illinois Emergency Relief Commission. This project was requested by the Illinois Emergency Relief Commission for maintenance and construction work and was approved by Leo M. Lyons, Administrator of Cook County, and A. H. Lord, Illinois Emergency Relief Commission State Administrator of Work Relief.

The Illinois Emergency Relief Commission was created by an Act of the General Assembly of the State of Illinois effective February 6, 1932. Chapter 23, section 464, of the Illinois State Bar Statutes, 1935, sets out the duties of said commission which are as follows:

"Powers and duties. It shall be the duty of the commission until March 1, 1937, to provide relief to residents of the State of Illinois, who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any other means deemed desirable by the commission. For the purpose of carrying out the provisions of this Act, the commission may make use of and co-operate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission has created many departments within itself since its creation through

which relief is administered; such as maintenance department, furniture shops, mattress factories, canneries, work relief divisions, shelters and other divisions or departments too numerous to mention. Said maintenance department has charge of maintenance work in all buildings operated by the Illinois Emergency Relief Commission. Said work includes carpentry, plumbing, janitor work, engineering, and general repair work. Said furniture shops manufacture furniture which is used in relief offices throughout the State. Said mattress factories manufacture mattresses for relief recipients and for shelters operated by the Illinois Emergency Relief Commission. Said canneries preserve vegetables and fruits which have been grown by relief recipients on Illinois Emergency Relief Commission soil. Said work relief divisions furnish men to the State Highway Department, counties, townships, cities and parks for general maintenance work. All of the above enterprises or projects use sharp-edged cutting tools, such as saws, chisels, mattocks, and axes. Said buildings operate electric motors, elevators, and boilers, all of which are governed by municipal ordinances.

Edward V. Chapman died on October 27, 1935, of chronic myocarditis.

Edward V. Chapman was assigned to work on said project on or about the 11th day of June, 1934. He had been assigned on other projects similar to this one previous to the date heretofore mentioned. He worked approximately forty (40) hours per week and for his services received Five Dollars (\$5.00); also maintenance at a shelter. The Illinois Emergency Relief Commission estimates that the cost of maintenance at a shelter is Nine Dollars (\$9.00) per month. Edward V. Chapman was only assigned to one week's work each month.

Mr. Chapman was directed to report to Mr. Peterson, who was in charge of the maintenance department at 758 West Harrison Street, Chicago. On the day heretofore mentioned, Mr. Chapman and other men were assigned to calcimine a certain room at 758 West Harrison Street. The work necessitated working on scaffolds. Said scaffolds had been constructed by other men on the project from old lumber. While in the course of his work, the scaffold collapsed and Mr. Chapman fell to the floor, approximately six feet.

Art Laundry, who was also working with Mr. Chapman at the time the scaffold gave way, fell to the floor but did not receive injuries as a result of this fall. A statement could not be secured from Mr. Laundry because his present whereabouts are unknown. Mr. Chapman was taken directly to the Cook County Hospital for medical treatment after the accident.

The records of the Cook County Hospital, Chicago, Illinois, were examined and they show that Edward V. Chapman suffered a fracture of the left tibia and os calcis. See Exhibit I.

In the course of Mr. Chapman's work, sharp-edged cutting tools were used, such as chisels and saws. There were also two steam boilers and electrically driven engines in said building. Said building was occupied by 800 men as temporary living quarters.

Mr. Chapman's accident was witnessed by Thomas Harris, 837 West Madison Street, Chicago, Illinois, who was also employed by the Illinois Emergency Relief Commission at the time of the accident. See Exhibit II.

Alex Graham, 12 South Peoria Street, Chicago, Illinois, foreman of the painters for the Illinois Emergency Relief Commission at the shelter, stated that Edward V. Chapman had sustained his injuries while working at 758 West Harrison Street when a scaffold gave way. See Exhibit III.

Dr. Nathaniel H. Adams, Chicago, Illinois, examined Mr. Chapman on or about the 11th day of July, 1935. At that time, Dr. Adams found that the lateral motion of the foot was greatly impaired and that at that time there was a specific loss of use of from thirty-five (35) to fifty (50) per cent of the foot. See Exhibit IV.

Payment of medical and hospital bills has been made by the Illinois Emergency Relief Commission.

Edward V. Chapman's accident was in the course of, and arose out of, his employment. Further the Illinois Emergency Relief Commission had notice of the accident and demand for compensation was made within six months after the accident.

Section 3, subsection 8, of the Workmen's Compensation Act of the State of Illinois provides:

"In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra hazardous * * *"

Section 8, subsection (a), of the Workmen's Compensation Act of the State of Illinois provides:

"The employer shall provide the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effect of the injury * * *

Section 8, subsection (c), of the Workmen's Compensation Act of the State of Illinois provides:

"For injuries in the following schedule, the employee shall receive compensation for the period of temporary total incapacity for work resulting from such injury, in accordance with the provisions of paragraphs (a) and (b) of this section, for a period not to exceed sixty-four weeks, and shall receive in addition thereto compensation for a further period subject to limitations as to amounts as in this section provided, for the specific loss herein mentioned, as follows, but shall not receive any compensation for such injuries under any other provision of this Act."

Section 8, subsection (c), paragraph 14, of the Workmen's Compensation Act of the State of Illinois provides:

"For the loss of a foot or the permanent and complete loss of its use, fifty per centum of the average weekly wage during one hundred and thirty-five weeks."

Edward V. Chapman filed a claim in the Court of Claims which is known as *Edward V. Chapman vs. State of Illinois*, No. 2510.

The Administrator has agreed to dismiss the above entitled cause and a release and waiver has been secured from the Administrator. The Administrator and his attorney have agreed to except Three Hundred and Fifty-Four Dollars (\$354.00) in full settlement for the injuries sustained by Edward V. Chapman.

COOK COUNTY HOSPITAL, CHICAGO, ILLINOIS.

| | |
|---|----------------------------|
| Patient's No.—1438693; Ward No. 34. | Diagnosis—Fract. |
| Name—Edward Chapman. | Metatarsals. |
| Age—59. Date of Birth..... | Complications. |
| Civil State—Divorced. | ..... |
| Husband of or Wife of..... | File No. 249. |
| Birth Place | Admitted—6-11-34. Hr.—6-20 |
| Trade, profession, or particular kind of work | P.M. |
| done, as spinner, sawyer, bookkeeper, etc. | Discharged—6-11-34. |
| ..... | Operations |
| Industry or business in which work was | Attending—Dr. Thorek. |
| done, as silk mill, saw mill, bank, etc. | House—Dr. Kimball. |
| ..... | Dr. Marks. |
| Date deceased last worked at this occupation | Condition on Discharge—Im- |
| (Month and year)..... | proved. |

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Total time (years) spent in this occupation

.....

Name of Father.....

Birth Place of Father.....

Maiden Name of Mother.....

Birth Place of Mother.....

How long in Chicago—18 years.

How long in United States.....

Ever Serve in Military or Naval Service of

U. S.

Rel. P. E.R.D. Fract. L. Tibia and Os Calcis.

Present Complaint

Injury to left foot 1 day.

Onset and Course—Patient states he fell off a platform about 8 feet and struck the ground landing on his left foot and injuring it so seriously that it swelled up became discolored and so painful he could not walk on it.

Exhibit I.

COOK COUNTY HOSPITAL, CHICAGO, ILLINOIS.

No. of Patient—Edward Chapman.

Ward No. No.

Patient had a doctor see him but never knew what he had.

X-ray shows fracture of pelvis.

Pt. examined is white man of 42, in bed comfortable, not imminently ill

D. P. 144/84 temp. 98.

Sculp Negative

Eyes React

Heart O. K.

Lingo O. K.

Pelvis Pains L. fubic obturator area to rt. sacro iliac area.

Impression fract. pelvis.

6-19 X-ray.

6-26 To remain in bed 45 days. Has been here since June 10. In outside Hospital May 20, been here 5 weeks.

7-10 Pt. gets around very well on crutches. Is ready to go home when he can be called for.

Exhibit I.

STATEMENT.

June 26, 1935

Thomas Harris, 837 West Madison Street, Chicago, Illinois, states that on June 11, 1934, he was employed by the Illinois Emergency Relief Commission as a painter; that on the date aforesaid, he was present when one Edward G. Chapman was injured while working as a painter at 758 West Harrison Street.

Mr. Harris further states that on June 11, 1934, he was told to go to 758 West Harrison Street and report to Mr. Peterson, who was at that time in

THE TRUST COMPANY OF CHICAGO, A CORPORATION, ET AL. 733
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charge of the Maintenance Department of the Illinois Emergency Relief Commission; that on this day about 25 men from the shelter at 116 S. Green Street reported to work at 758 West Harrison Street.

Mr. Harris further states that he was chosen out of a group of about 25 men to calcimine a certain room at 758 West Harrison St., that Mr. Ed. Chapman, Mr. Art Laundry, and a man known as "Frenchy" were assigned to this job. The work necessitated working from a 6' scaffold; said scaffold had been constructed by another group of men. The scaffold was made from used lumber. Frenchy and Mr. Harris worked from one end of the scaffold while Art Laundry and Ed. Chapman worked from the other end. The work was just getting under way when Art Laundry and Ed. Chapman's scaffold broke, the result both men were thrown to the ground. Mr. Chapman seemed to have sustained serious injuries, and the foreman, Mr. Alex Graham, directed Mr. Chapman to be taken to the hospital for medical attention.

Mr. Harris further states that he had known Mr. Chapman but three days previous to the accident.

Exhibit II.

STATEMENT.

Alexander Graham, Dawes Hotel, 12 S. Peoria Street, Chicago, Illinois, stated that on June 11, 1934, he was employed by the Illinois Emergency Relief Commission as a painter foreman; that on the day aforesaid, he was present when Edward B. Chapman was injured while working as a painter at 758 West Harrison Street.

Mr. Graham further stated that Edward B. Chapman had been assigned to work by Mr. Peterson, who was on that date in charge of the Maintenance Department of the Illinois Emergency Relief Commission. That he had about 25 men assigned to him from the Illinois Emergency Relief Commission shelters. Mr. Chapman had been assigned to calcimine one of the room of said building; that it was necessary to work from a scaffold; said scaffold had been constructed by Mr. Chapman and the other men working on said project. These scaffolds were built out of old lumber which had been stored in the basement of said building. The particular scaffold which Mr. Chapman was working on had been in use by him three days prior to said accident. Mr. Chapman was working on the scaffold when the plank on which he and two other employees were standing on broke, resulting in Mr. Chapman falling about six feet to the floor, landing feet first. After the accident, said plank was examined and it was found to be defective; said defect could not have been discovered before because it was what one might consider a hidden defect, but after said accident, all this old scaffolding was discarded and new planks were used from that day on.

The names of the other employees who witnessed said accident are unknown to me, the reason being most men were assigned to us by number, in fact, that was the only identification men working in said building had.

Mr. Chapman was paid \$5 a week for his services while employed as a painter at 758 West Harrison Street.

Exhibit III.

July 11, 1935.

Mr. James H. Turner,
160 North LaSalle St.,
Chicago, Illinois.

DEAR SIR--Re: *Edw. V. Chapman vs. Illinois Emergency Relief*. Mr. Chapman, 323 South Aberdeen Street, was injured June 11, 1934. On that date he was employed as a painter, and a plank on which he was standing broke, and he fell a distance of 6½ to 7 feet, thereby fracturing his left heel bone.

He was cared for at the Cook County Hospital by Dr. Zelas and Dr. Reynold.

He weighed 133 pounds at the time of the accident.

The ankle is enlarged. It measures 2¾ inches in diameter, whereas the right measures 2½ inches. These measurements were made with callipers.

Lateral motion is very greatly impaired. There is some impairment of full flexion and extension of the ankle.

There is a mass of bony callus lying beneath the lateral malleolus. He walks quite lame, and states that the foot is quite painful.

Our X-ray film of the left heel and ankle shows a small fragment of bone unattached near the posterior tubercle of the talus. There is some impaction at the posterior articulation of the talus and calcaneus. It also shows a sclerosed line, indicative of fracture of the calcaneus; also a mass of callus on the lateral border of the calcaneus beneath the lateral malleolus.

The specific loss of use is from 35% to 50% of the foot.

Yours very truly,

NATHANIEL H. ADAMS

NHA:K

Exhibit IV.

ADVISORY OPINION BY MR. JUSTICE YANTIS.

To the Illinois Emergency Relief Commission:

Pursuant to your request for an Advisory Opinion, based upon the attached statement of facts submitted by you in the matter of the claim of *The Trust Company of Chicago, a Corporation, Administrator of the Estate of Edward V. Chapman, Deceased vs. Illinois Emergency Relief Commission*, the following Opinion is rendered, based upon the aforementioned statement:

From the statement submitted it appears that Edward V. Chapman was assigned on Construction Project S1-B4-398 of the Illinois Emergency Relief Commission, at 1319 S. Michigan Avenue, Chicago; that on the 11th day of June, 1934, while so employed he was sent to 758 W. Harrison Street to do certain repair work. That while in the course

of his work a scaffold on which he was standing collapsed and he fell approximately six (6) feet to the floor, thereby suffering a fracture of the left Tibia and Osealcis. Payment of medical and hospital bills appear to have been made by the I. E. R. C. and the statement further indicates that Chapman suffered a specific partial loss of thirty-five (35) to fifty (50) per cent of the use of his left foot.

It further appears that Edward V. Chapman filed application for award in the Court of Claims, same now appearing as C. of C. No. 2510; that he thereafter died on October 27, 1935 of chronic Myocarditis. From the statement filed it appears that The Trust Company of Chicago, a corporation has been appointed Administrator of the Estate of Edward V. Chapman, Deceased, and that it is with such Company, as personal representative of Edward V. Chapman, Deceased, that your Commission is now dealing, and that such Administrator and its Attorneys have agreed to accept Three Hundred Fifty-four (\$354.00) Dollars in full settlement for the Edward V. Chapman claim.

It does not appear from the statement that Edward V. Chapman left surviving any widow, child or children whom he was under legal obligation to support at the time of his injury, or any parent, child or children, grandparent or grandchild or collateral heirs who were wholly or partially dependent upon him.

The Workmen's Compensation Act contains the following provision:

"Any right to receive compensation hereunder shall be extinguished by the death of the person entitled thereto, subject to the provisions of this Act relative to compensation for death received in the course of employment, and subject to the provisions of paragraph (e) of Section 8 of this Act relative to specific loss; provided, that upon the death of a beneficiary, who is receiving compensation provided for in Section 7, leaving surviving a parent, sister or brother," etc., etc. "the latter shall receive," etc., etc. (Sec. 21, W. C. A.)

In reading the foregoing we find that the extinguishment of the right to receive compensation is made subject to two conditions, the second being the provisions of Paragraph (e) of Section 8 of the Compensation Act, relative to specific loss.

The claim in question as now submitted is for a specific partial loss of thirty-five (35) to fifty (50) per cent of the use of the employee's left foot, and the proposed settlement is on the basis of the first figure, i. e. thirty-five (35) per cent.

Settlement with claimant is apparently authorized under the several provisions of the Workmen's Compensation Act and the amount for which such settlement is to be made i. e. Three Hundred Fifty-four (\$354.00) Dollars, is the sum to which plaintiff would be entitled under the minimum of Seven and 50/100 (\$7.50) Dollars per week for thirty-five (35) per cent specific loss of use of his left foot. We are of the opinion that settlement may be properly made by your Commission for the latter sum under the statement of facts heretofore submitted by you.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 22.

Settlement of claim for \$215.00 justified and found advisable.

FRANK DISKO, ADMINISTRATOR OF THE ESTATE OF GEORGE KUHTOCK,
DECEASED, Claimant vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 22, 1937.

STATEMENT OF FACTS.

Frank Disko, Administrator of the Estate of George Kuhtock, deceased, 160 North LaSalle Street, Chicago, Illinois, claims that George Kuhtock sustained an injury on the 28th day of November, 1934, to his left leg and left wrist while working for the Illinois Emergency Relief Commission as a maintenance man on Project S1-B20-820. Said project was maintenance and construction work which provided for personnel for maintenance and construction department at headquarters of the Illinois Emergency Relief Commission, 1319 South Michigan Avenue, Chicago, Illinois, and at the Chase Park Relief Office, 4410 Ravenswood Avenue, Chicago, Illinois. Said department took care of alteration and repair work for the following relief agencies: Main office at 1319 South Michigan Avenue, Chicago, Illinois; Personnel office at 1222 South Michigan Avenue, Chicago, Illinois; Unemployment Relief Service in Cook County; Transient Homes in Cook County; Mattress and Comforters Factory; Tool Department in Cook County; Warehouses in Cook County; furniture in all relief offices in the State; also the building of furniture for nursery schools. Said project was instituted on or about the 1st day of November, 1934, and was completed on the 2nd day of April, 1935. Total cost of said project was

\$83,908.50. Said amount included labor and materials. All monies for said project were furnished by the Illinois Emergency Relief Commission. This project was requested by the Illinois Emergency Relief Commission for maintenance and construction work and was approved by Leo M. Lyons, Administrator of Cook County, and A. R. Lord, Illinois Emergency Relief Commission State Administrator of Work Relief.

The Illinois Emergency Relief Commission was created by an Act of the General Assembly of the State of Illinois effective February 6, 1932. Chapter 23, Section 464, of the Illinois State Bar Statutes, 1935, sets out the duties of said commission which are as follows:

"Powers and duties. It shall be the duty of the commission until March 1, 1937, to provide relief to residents of the State of Illinois, who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any other means deemed desirable by the commission. For the purpose of carrying out the provisions of this Act, the commission may make use of and cooperate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission has created many departments within itself since its creation through which relief is administered; such as maintenance department, furniture shops, mattress factories, canneries, work relief divisions, shelters and other divisions or departments too numerous to mention. Said maintenance department has charge of maintenance work in all buildings operated by the Illinois Emergency Relief Commission. Said work includes carpentry, plumbing, janitor work, engineering, and general repair work. Said furniture shops manufacture furniture which is used in relief offices throughout the State. Said mattress factories manufacture mattresses for relief recipients and for shelters operated by the Illinois Emergency Relief Commission. Said canneries preserve vegetables and fruits which have been grown by relief recipients on Illinois Emergency Relief Commission soil. Said work relief divisions furnish men to the State Highway department, counties, townships, cities and parks for general maintenance work. All of the above enterprises or projects use sharp-edged cutting tools, such as saws, chisels, mattocks, and axes. Said

buildings operate electric motors, elevators and boilers, all of which are governed by municipal ordinances.

George Kuhtock died the 25th day of March, 1937, the cause of death being bronchial asthma and arteriosclerosis.

George Kuhtock was directed by Mr. Reed at 1758 West Harrison Street, Chicago, to go to the Adams School Building, located at 849 Townsend Street, where some steel lockers were to be moved from the fourth floor to the basement. While Mr. Kuhtock was moving said lockers down the steps with four or five other men, a locker slipped and fell against his left side, pinning him against the wall. The weight of these lockers was approximately five hundred (500) pounds. As soon as the accident occurred, Mr. Kuhtock was taken to the Cook County Hospital, Chicago, for first aid treatment.

The records of the Cook County Hospital show that George Kuhtock received a callos fracture of his left wrist and lacerations of his left leg. See Exhibit I.

In the course of George Kuhtock's work, sharp-edged cutting tools were used, such as chisels, saws and blow torches. There were also steam boilers and electric elevators in said building.

George Kuhtock's accident was witnessed by Joe Supron, 1210 South Morgan Street, Chicago, a co-worker. See Exhibit II.

Dr. Nathaniel H. Adams, Chicago, examined George Kuhtock on the 11th day of July, 1935. At that time, Dr. Adams stated that there was a specific loss of use of the left hand in the amount of thirty-five (35) per cent. See Exhibit III.

Dr. Theodore Lescher, 1551 North Crawford Avenue, Chicago, Illinois, examined George Kuhtock on or about the 28th day of August, 1935, for the Illinois Emergency Relief Commission. At that time, Dr. Lescher stated that there was a loss of from twenty-five (25) to thirty-five (35) per cent of the use of the left hand.

The Cook County Hospital, Chicago, has rendered the Illinois Emergency Relief Commission a bill in the sum of Forty-two Dollars (\$42.00) for services rendered George Kuhtock while he was in said hospital.

George Kuhtock's accident was in the course of, and arose out of, his employment. Further, the Illinois Emergency Relief Commission had notice of the accident and de-

mand for compensation was made within six months after the accident.

Section 3, subsection 8, of the Workmen's Compensation Act of the State of Illinois provides:

"In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra hazardous * * *

Section 8, subsection (a), of the Workmen's Compensation Act of the State of Illinois provides:

"The employer shall provide the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effect of the injury * * *

Section 8, subsection (e), of the Workmen's Compensation Act of the State of Illinois provides:

"For injuries in the following schedule, the employee shall receive compensation for the period of temporary total incapacity for work resulting from such injury, in accordance with the provisions of paragraphs (a) and (b) of this section, for a period not to exceed sixty-four weeks, and shall receive in addition thereto compensation for a further period subject to limitations as to amounts as in this section provided, for the specific loss herein mentioned, as follows, but shall not receive any compensation for such injuries under any other provision of this Act."

Section 8, subsection (e), paragraph 12, of the Workmen's Compensation Act of the State of Illinois provides:

"For the loss of a hand, or the permanent and complete loss of its use, fifty per centum of the average weekly wage during one hundred and seventy weeks."

Section 8, subsection (e), paragraph 14, of the Workmen's Compensation Act of the State of Illinois provides:

"For the loss of a foot or the permanent and complete loss of its use, fifty per centum of the average weekly wage during one hundred and thirty-five weeks."

George Kuhtock filed a claim in the Court of Claims which is known as *George Kuhtock vs. State of Illinois*, No. 2554, on or about the 12th day of December, 1934.

The Administrator has agreed to dismiss the above entitled cause and a release and waiver has been secured from the Administrator. Administrator and his attorney have agreed to accept Two Hundred and Fifteen Dollars (\$215.00) in full settlement for the injuries sustained by George Kuhtock. The Illinois Emergency Relief Commission has agreed to pay the Cook County Hospital Forty-two Dollars

(\$42.00) for hospital services rendered George Kuhtock. Said amount has been investigated and found to be reasonable and just for the services rendered. The award should include the amount agreed to by settlement and hospital costs.

Name—George Kuhtock.
 Address—1210 South Morgan.
 Name of Relative or Friend—Case Worker;
 Address and Phone 2741.
 Mr. Mennick—Same; Monroe.
 Occupation—Gen. Lab.; Color—W.; Age 57;
 Sex M.; Religion Cath.
 Res. of County—20 years; Nativity—Russian; Civil State—Wid.
 How long sick?.....Can patient walk without aid? Yes.
 Can patient answer questions intelligently?

 Brought to the hospital how? Off. Brosnam; Dis. 35.
 Nature of place removed from—Shelter.
 If attended by physician, give address and phone number—No.....

 If in hospital before, when.....No.....
 Name of hospital.....No. N.....
 If injured, or marks of violence, state where and how received: Fell down the stairs at 659 Hobble St.
 Diagnosis—Lac left leg and inj to left wrist.
 Attending Phys.—Schnager; Ex. Phys.—Gilbert; Rec. Clerk W.
 Nature of Case—Surg.; Report made out by—Stewart.

Exhibit I.

COOK COUNTY HOSPITAL, CHICAGO, ILLINOIS.

| | |
|---|----------------------------------|
| Patient's No.—1472091; Ward No. 33. | Diagnosis—Calle's Fracture. |
| Name—George Kuhtock. | ..... |
| Age.....Date of Birth..... | Complications—Laceration of leg. |
| Month Day Year | ..... |
| Civil State ..... | ..... |
| Single Married Widowed Divorced | File No.—2889. |
| Husband of } or Wife of } | Admitted—11-27-34. |
| Birth Place | Hour—11:05 A. M. |
| City State Country | Discharged |
| Trade, profession, or particular kind of work done, as spinner, sawyer, bookkeeper, etc.—Laborer. | Operations—Luturned. |
| Industry or business in which work was done, as silk mill, saw mill, bank, etc. | Attending—Dr. Schnager |
| | House—Dr. Fara, Sr. |
| | Dr. Sennenthal, Jr. |

Date deceased last worked at this occupation—(Month and year).....
 Total time (Yrs) spent in this occupation.....
 Name of Father.....
 Birth Place of Father.....
 City State Country
 Maiden Name of Mother.....
 Birth Place of Mother.....
 City State Country
 How long in Chicago—20 Years.
 How long in United States.....Years
 Ever Serve in Military or Naval Service of
 U. S.....; Rel.—Cath.

E. R. O. Has L. Leg Injury to Rt. wrist and left leg.

P. C. Injury to left wrist and left leg.

O. & C. Pt. cannot speak very much English but explains that he fell down the steps while carrying some boxes. Fell down the steps and hurt his left wrist and cut his leg. His symptoms are:

Pain

Deformities—posterior displacement of wrist

Swelling—Bleeding of leg

Physical is essentially negative other than

Exhibit I.

COOK COUNTY HOSPITAL, CHICAGO, ILLINOIS.

| No. of Patient | Ward | Name |
|----------------|------|------|
|----------------|------|------|

Calles fract. of left wrist.

Management & laceration of left leg.

Arteries clamped & ligated—Black sell sentemi of laceration.

Anterior—Mold applied to left forearm following reduction.

Under ether anesthesia.

SORENTHAL.

Exhibit I.

COOK COUNTY HOSPITAL.

X-RAY DEPT.

Name—George Kuhtock; Age—57; Ward—33; Date—11-28-34.
 Plate No. 54658 C. C. D.

Comminuted fracture in the lower third of the left radius with the fragments in good position in the A. P. view. No apparent fracture in the upper half of the left tibia.

J. P. BENNETT, M. D.

Exhibit I.

STATEMENT.

July 6, 1935

Joe Supron, 1210 S. Morgan Street, stated that on Tuesday, November 27, 1934, he was present when George Kuhtock was injured while he was helping some other men to carry a box down a flight of stairs at a school located at Hobbie and Thomas Streets.

George Kuhtock and myself left the shelter at the above address on the date aforesaid and went over to 758 West Harrison Street to report for work. The name of the man we reported to is unknown. All that I remember is that some one told about eight of us men to get into a Ford truck. The owner or operator of the truck is unknown at this date. The driver first took two of the men over to a building on Hobbie Street; then drove the rest of the men to the school which is located at Hobbie and Thomas. Our duty at the school consisted of moving large boxes from one floor to another. When the accident occurred George Kuhtock was assisting about five men in moving a large box from the fourth floor. He had taken about four steps down the stairs when one of the men who was helping to guide the box on the rear slipped. The result was that it struck George Kuhtock on the leg and arm. When I felt the box slipping, I jumped; this saved me from injury.

I have been acquainted with George Kuhtock for about one year, and since our first meeting, on about an average of twice a week, we go out and get drunk together. George Kuhtock might have been drunk the morning of the accident.

Exhibit II.

July 11, 1935

Mr. James H. Turner,
111 W. Washington St.,
Chicago, Illinois.

DEAR SIR—Re: *George Kuhtock vs. Illinois Emergency Relief*. Mr. Kuhtock, living at Chicago Avenue and Townsend Street, was injured last Thanksgiving Day. On that date he and several other men were carrying a heavy box down a stairs. One of the men let loose and the box fell, thereby injuring Mr. Kuhtock's left leg and left wrist.

There was a cut on the anterior surface of the left leg which has left a scar $3\frac{1}{2}$ inches long.

Today the left wrist is swollen, measuring $7\frac{1}{2}$ inches in circumference and the right wrist $7\frac{1}{4}$ inches. The fingers can be doubled into the palm, but it is very painful to do this with the index and second fingers, and the motion is resisted. Wrist motion is impaired 20 degrees in flexion and 20 degrees in extension.

Our X-ray film of the left wrist shows fracture of the left radius in the distal third. The fracture is impacted. The fragments are in fair alignment.

The specific loss of use is 35% of the left hand.

The left leg has recovered, except for the scar which I have already described.

Yours very truly,

NATHANIEL H. ADAMS

NHA:K

Exhibit III.

ADVISORY OPINION BY MR. JUSTICE YANTIS.

To the Illinois Emergency Relief Commission:

Pursuant to your request for an Advisory Opinion, based upon the attached statement of facts submitted by you in the matter of the claim of Frank Disko, Administrator of the Estate of *George Kuhlock, Deceased* vs. *Illinois Emergency Relief Commission*, the following Opinion is rendered, based upon the aforementioned statement:

From the Statement submitted it appears that George Kuhlock was assigned to work, on November 28, 1934, on Construction Project S1-B20-820 of the Illinois Emergency Relief Commission, and was directed by those in charge to go to 849 Townsend Street, Chicago, where some steel lockers were to be moved. While he was moving same down the steps from the fourth floor to the basement, a locker slipped and fell against his left side. He was taken to the Cook County Hospital, and the records of that Institution show that he received a fracture of his left wrist and lacerations of his left leg. The statement further shows that a thirty-five (35) per cent loss of use of the left hand of the employee resulted. George Kuhlock filed an application for an award in the Court of Claims on or about December 12, 1934, the case being C. of C. No. 2554. That claim has never been disposed of and he died March 25, 1937, from bronchial asthma and arteriosclerosis. Claimant herein was appointed Administrator of the Estate and he and his attorney according to the statement have agreed to accept Two Hundred Fifteen (\$215.00) Dollars in full settlement of the injuries sustained by him. It is further noted that you have agreed to pay the Cook County Hospital Forty-Two (\$42.00) Dollars for services rendered. The payment of this item and any first-aid appear fully justified from the record. From the statement it appears that George Kuhlock did not leave surviving him any widow, child or children or others who would be entitled to an award in case of his death.

The Workmen's Compensation Act contains the following provisions:

"Any right to receive compensation hereunder shall be extinguished by the death of the person entitled thereto, subject to the provisions of this Act relative to compensation for death received in the course of employment, and subject to the provisions of Paragraph (c) of Section 8 of this Act relative to specific loss; provided, that upon the death of a beneficiary, who is receiving

compensation provided for in Section 7, leaving surviving a parent, sister or brother," etc., etc. "the latter shall receive," etc., etc. (Sec. 21 W. C. A.)

In reading the foregoing we find that the extinguishment of the right to receive compensation is made subject to two conditions, the second being the provisions of paragraph (c) of section 8 of the Compensation Act, relative to specific loss.

The claim in question as now submitted is for a thirty-five (35) per cent specific partial loss of use of the left hand of the employee, George Kuhlock. Payment under the terms of the Act to the claimant herein as Administrator of the Estate of George Kuhlock, deceased is apparently authorized under the wording of the several provisions of the Compensation Act, and in the opinion of this court settlement by your commission with the claimant for the sum of Two Hundred Fifteen (\$215.00) Dollars may properly be made.

As it appears that the Cook County Hospital rendered services to George Kuhlock at the request of the Illinois Emergency Relief Commission, and has submitted its bill in the sum of Forty-Two (\$42.00) Dollars for such services, payment thereof direct to such Hospital may be legally made.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 23.

Settlement of claim for amount not exceeding \$484.00, advised

HARRY K. STEELMAN, Claimant *vs.* ILLINOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed July 1, 1937.

STATEMENT OF FACTS.

Harry K. Steelman, 827 South Illinois Street, Springfield, Illinois, claims that on or about the 1st day of February, 1935, he contracted spinal meningitis while working for the Illinois Emergency Relief Commission as a music and dramatic teacher on Project No. 1513. Said project was inaugurated by the Illinois Emergency Relief Commission under Civil Works Educational Service. Said project employed four teachers, each at Seventy-Five Dollars (\$75.00) per month. They directed and supervised the work of 650 transient men who were housed in the Springfield Service Bureau. Classes were held from 9:00 A. M. to 12:00 A. M. and from 1:00 P. M. to 4:00 P. M. from Monday to Friday of each week. This proj-

ect was approved by Albert Schlipf, director of the Sangamon County Emergency Relief Committee; also by James E. Maxwell and Frank T. Barey, superintendent of the public schools of Springfield, Illinois; also by Wilfred S. Reynolds, executive director of the Illinois Emergency Relief Commission, and by F. G. Blair, State superintendent of public instruction. Said project was approved by the above mentioned parties on or about February 1, 1934, and was to run indefinitely.

The Illinois Emergency Relief Commission was created by an Act of the General Assembly of the State of Illinois effective February 6, 1932. Chapter 23, section 464, of the Illinois State Bar Statutes, 1935, sets out the duties of said commission, which are as follows:

"Powers and duties. It shall be the duty of the commission until March 1, 1937, to provide relief to residents of the State of Illinois, who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any other means deemed desirable by the commission. For the purpose of carrying out the provisions of this Act, the commission may make use of and cooperate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission has created many departments within itself since its creation through which relief is administered; such as maintenance department, furniture shops, mattress factories, canneries, work relief divisions and other divisions or departments too numerous to mention. Said maintenance department has charge of maintenance work in all buildings operated by the Illinois Emergency Relief Commission. Said work includes plumbing, carpentry, janitor work, engineering, and general repair work. Said furniture shops manufacture furniture which is used in relief offices throughout the State. Said mattress factories manufacture mattresses for relief recipients and for shelters operated by the Illinois Emergency Relief Commission. Said canneries preserve vegetables and fruits which have been grown by relief recipients on Illinois Emergency Relief Commission soil. Said work relief divisions furnish men to the state highway department, counties, townships, cities and parks for general maintenance work. All of the above enterprises or projects use sharp-edged cutting tools such as saws, chisels, mattocks and axes. Said buildings operate electric motors, ele-

vators and boilers, all of which are governed by municipal ordinances.

Claimant was assigned to work on said project on or about the 1st day of August, 1934. He worked approximately thirty (30) hours per week and received Seventy-Five Dollars (\$75.00) for his services per month.

Claimant was directed by Watson Dickerman, who was the superintendent at the Transient Bureau, on or about February 1, 1935, to prepare and direct a dramatic play for the transient men. On this day about thirty-five (35) transient men took part in the festivities. During the course of the entertainment, one of the entertainers, name unknown, went into the audience and conducted part of his work. While he was in the course of his work, he coughed a great deal, and shortly after the play, he left the shelter for places unknown. The following day five people were stricken with spinal meningitis, and it has been the consensus of opinion and also of Dr. W. H. Tucker, coordinating epidemiologist of the State Department of Health, that this man was a carrier of spinal meningitis.

Claimant became seriously ill on February 2, 1935, and Dr. Franklin Maurer, Springfield, directed that he be taken immediately to St. John's Hospital in Springfield for care. Claimant remained in the isolation ward from the day heretofore mentioned until the 28th day of February. After this day, he was taken to his home where he was bedridden for the next six weeks.

Dr. W. T. Tucker was interviewed and he was of the opinion that the spinal meningitis which had appeared in Springfield at this time could be considered an epidemic. See Exhibit I.

The records of the State Health Department at Springfield, Illinois, were examined and the following report was obtained. See Exhibit II.

Claimant was under the care of Dr. Franklin Maurer from February 2, 1935, until December of 1935. Although he was able to be about with the assistance of a cane, he was not able to carry on his usual work. During the months from February to June, 1935, he received Fifteen Dollars (\$15.00) per week from the First Methodist Episcopal Church in Springfield for directing the church choir. Although during this period he was not able to carry on his duties, the church

continued to pay him his salary. His work was taken over by a Miss Marilla McCoy during this time.

In the course of claimant's work, there were electrically driven motors and boilers in the building in which he worked. Said building was occupied by approximately 650 transient men for living quarters.

Dr. Franklin Maurer stated that claimant's temporary disability terminated on or about December 1, 1935, although a person stricken with spinal meningitis can never recover completely because the disease destroys part of the nervous system.

Payment of medical and hospital bills has been made by the Illinois Emergency Relief Commission.

Claimant's accident was in the course of, and arose out of, his employment. Further, the Illinois Emergency Relief Commission had notice of the accident and demand for compensation was made on his employer within six months after the accident.

Section 3, subsection 8, of the Workmen's Compensation Act of the State of Illinois provides:

"In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein: each of which occupations, enterprises or businesses are hereby declared to be extra hazardous * * *

Section 8, subsection (a), of the Workmen's Compensation Act of the State of Illinois provides:

"The employer shall provide the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury * * *

Section 8, subsection (c), of the Workmen's Compensation Act of the State of Illinois provides:

"For injuries in the following schedule, the employee shall receive compensation for the period of temporary total incapacity for work resulting from such injury, in accordance with the provisions of paragraphs (a) and (b) of this section, for a period not to exceed sixty-four weeks, and shall receive in addition thereto compensation for a further period subject to limitations as to amounts as in this section provided, for the specific loss herein mentioned, as follows, but shall not receive any compensation for such injuries under any other provisions of this Act."

At the time of the accident, claimant had one child under sixteen years of age—Beverly, fifteen years of age.

Claimant claims that before he was stricken with spinal meningitis, he was employed by the First Methodist Episcopal Church as a choir director receiving Fifteen Dollars (\$15.00) per week from September 1st to June 1st, and that he had taught music during the day and received approximately Thirty-Five Dollars (\$35.00) a week for his services. Claimant is now employed by the Old Age Assistance Service at \$160.00 per month. At this time he is doing clerical work.

Claimant filed a petition in the Court of Claims which is known as *Harry K. Steelman vs. State of Illinois*, No. 2744. Stipulation to dismiss the the above entitled cause has been filed in the Court of Claims and a release and waiver has been secured from the claimant. Claimant and his attorney have agreed to accept Five Hundred and Eighty-Five Dollars (\$585.00) in full settlement of his claim against the State of Illinois.

COPY.

STATE OF ILLINOIS
DEPARTMENT OF PUBLIC HEALTH
Springfield

July 13, 1936

SPRINGFIELD—Epidemic Cerebrospinal Meningitis.

(In reply refer to C. D.)

Mr. Glenn Trevor,
Assistant Attorney General,
Supreme Court Building,
Springfield, Illinois.

DEAR MR. TREVOR: In response to your request of a few weeks ago, I am enclosing a copy of the report of my investigation of Epidemic Cerebrospinal Meningitis which occurred in Springfield in the late winter and early spring of 1935. This report has not been changed in any way since it was written 16 months ago, and it presents an unbiased statement of the results of my investigations.

At the time that meningitis appeared in Springfield in February, 1935, there were outbreaks of the same disease in several cities throughout the country in which transient camps were maintained. Mr. Harry Hopkins of Washington, D. C. requested the United States Public Health Service to draw up a list of regulations which could be put into effect in the transient shelters to prevent the further spread of the disease. Accordingly, it is general knowledge that the transient shelters were the sources of several outbreaks of meningitis during the early months of 1935.

If I can be of further service to you in this connection, please feel free to call upon us.

By direction of the Director,

Yours very truly,

W. H. TUCKER, M. D.,

Coordinating Epidemiologist.

Exhibit I.

COPY.

To: Frank J. Jirka, M. D., Director of Public Health.
From: W. H. Tucker, M. D., Assistant Epidemiologist.
State Department of Public Health, Springfield, Illinois, Division of Communicable Diseases.

EPIDEMIC CEREBROSPINAL MENINGITIS IN THE SPRINGFIELD AREA.

April 2, 1935.

Since the first week of February, 1935, there has been an outbreak of epidemic meningitis in Springfield and in some of the surrounding towns which is causing a certain degree of apprehension among the residents of this community.

Indications are that the first three residents of Springfield who developed epidemic meningitis received their infection from a common source, which must have been a carrier, for no cases of the disease were reported in Springfield during the past November, December and January. These cases occurred during the first week of February, 1935, when three persons suddenly became ill at approximately the same time. The simultaneous appearance of these three cases was so unusual that it was felt that an investigation should be made for the purpose of learning whether or not there was a common source of infection. Accordingly, Dr. Frank J. Jirka, Director of the State Department of Public Health, assigned me to make an investigation of the outbreak in cooperation with the Board of Health of the city of Springfield.

Investigation revealed that these three persons, Mrs. Mary L. Morrison, Miss Margaret Frantz and Mr. Harry Steelman, had attended an entertainment on Friday, January 26, given by inmates of the Federal transient shelter maintained in this city. The program was first presented to approximately 500 transients on Thursday, January 25, and was repeated the following evening for approximately 200 Springfield residents who are interested in social work. Aside from the members of the cast, there were only about 10 transients in the audience that evening.

On careful questioning it was found that an itinerant magician was one of the entertainers on the program. During the course of the program this man left the stage, came down into the auditorium and climbed a post along the aisle near a large group of spectators. From his position on this post, he carried on an animated conversation and discussion with some one on the stage. In this manner it was easily possible for him to shower the persons in the audience near him droplets of the excretions from his nose and throat. Two of the persons who became ill sat next to the post which the entertainer climbed. This man also had a great deal of contact backstage with the gentleman, Mr. Harry Steelman, who was directing the entertainment, who later became the third victim of the disease. It is assumed, therefore, that the magician was a carrier of the germ which causes epidemic meningitis, although this has not been proven conclusively. As is the habit of transients, the magician and his family left Springfield a few days following the enter-

tainment. He told friends he was going to the southern part of Illinois or Missouri, and was traveling in his own truck. A dragnet was immediately put on throughout the state for the purpose of finding him to determine definitely whether or not he was a carrier of this disease. The state health authorities in Missouri and Kentucky were also notified to be on the lookout for this man, but up to the present time no trace of him has been found.

When the investigation was first started, we were not sure that anyone in connection with the transient bureau had anything to do with the outbreak, but subsequent developments indicated that someone in the shelter most likely was the source of the first cases. The state and local directors of the transient bureau extended their fullest cooperation in this investigation and did everything in their power to help clear up the situation. Nine days following the appearance of the three cases heretofore mentioned, a man (Charles Barr) in one of the Springfield transient shelters became acutely ill with epidemic meningitis. This man had been sleeping in one shelter and taking his meals in another. It was decided that immediate quarantine measures would have to be instituted in order to prevent further spread of the disease. Therefore it became necessary to quarantine more than 300 men who occupied these two shelters and had come in contact with the sick man.

Studies of extensive outbreaks of epidemic meningitis in the past have shown that healthy carriers of the disease are generally involved. It was decided to make cultures from the throats of the 300 men in quarantine in order to determine if any of them were carriers of the germs. Dr. Howard J. Shaughnessy, Director of the Division of Laboratories, supervised this work, and four of the transients were found to be carriers of these germs. No carriers were found in a group of more than 100 townspeople who attended the program. The carriers were isolated and immediately placed under medical treatment, with the result that their carrier condition was overcome in one week. Soon after the quarantine was instituted a second case of epidemic meningitis (John Shaw) occurred at Camp Schrader, a work camp maintained for transients by the Springfield transient bureau in Mason County near Kilbourne. Men from the transient shelter in this city had been sent to Camp Schrader regularly up until the time that quarantine was in force. Apparently some of the men had been carriers for some time past, and had gone to Camp Schrader before the shelters in Springfield were quarantined. One of the men from Camp Schrader returned to his home in Girard in Macoupin County, and a few days later his brother (James Vanausdale) was brought to St. John's Hospital suffering from epidemic meningitis. This makes a total of six cases, three in townspeople and three in connection with transients, all of which were traced to contacts with persons in the transient shelters. Of these persons, death occurred in only one instance (Charles Barr). The quarantine of the two shelters in Springfield and of Camp Schrader, and the isolation of the carriers was effective in checking the outbreak in the Federal transient bureau. No new cases have appeared in the shelters since that time.

Exhibit I.

COPY.

To: File.

From: R. C. Eardley.

March 4, 1936.

Re: *Harry Steelman vs. State of Illinois.*

The records of the State Health Department were examined at Springfield, Illinois, and it was found that under Dr. C. W. Milligan, who was then Health Physician, in 1921 there were no cases of meningitis reported to the Health office.

In 1922, two cases of meningitis were reported.

In 1923, two cases of meningitis were reported.

In 1924, three cases of meningitis were reported.

In 1925, one case of meningitis was reported.

In 1926, no cases of meningitis were reported.

In 1927, two cases of meningitis were reported.

In 1928, three cases of meningitis were reported.

In 1929, three cases of meningitis were reported.

In 1930, five cases of meningitis were reported.

In 1931, ten cases of meningitis were reported.

In 1932, two cases of meningitis were reported.

In 1933, three cases of meningitis were reported.

In 1934, two cases and two deaths of meningitis were reported.

In 1935, twenty-six cases and eight deaths of meningitis were reported.

In 1936, seven cases of meningitis, up to March 6, were reported; also six cases of meningitis in neighboring towns.

Dr. H. H. Tuttle, who is now Health Commissioner for Springfield, stated that the twenty-six cases of meningitis, which were reported in 1935, could not be considered an epidemic.

Exhibit II.

ADVISORY OPINION BY MR. JUSTICE YANTIS.

To the Illinois Emergency Relief Commission;

Pursuant to your request for an Advisory Opinion, based upon the attached statement of facts submitted by you in the matter of the claim of *Harry K. Steelman vs. Illinois Emergency Relief Commission*, the following Opinion is rendered, based upon the aforementioned statement. From same it appears that claimant resides in Springfield, Illinois and was employed to work as a music and dramatic teacher on Project No. 1513, inaugurated by the Illinois Emergency Relief Commission as a part of the Civil Works Educational Service. In connection with his activities, he with three other teachers, directed and supervised the work of six hundred fifty (650)

transient men who were housed in the Springfield Service Bureau. Classes were held twice a day from Monday to Friday of each week. On February 1, 1935 claimant, under instructions from his Superintendent, was engaged in directing a dramatic play for the transient men. About thirty-five transients took part in the festivities. One of the entertainers, name unknown, coughed a great deal. A few days after the entertainment he and his family left Springfield and although the State Health Department attempted to locate him throughout Missouri, Kentucky and Illinois, no later trace of him has been found.

The next day after the entertainment two residents of Springfield who had sat near the unknown transient and the claimant herein, Harry K. Steelman, were all stricken with spinal meningitis.

The statement discloses that prior to that date spinal meningitis carriers had been brought to the camp, and claimant predicates his claim upon the theory that these people and the unknown transient were carriers of spinal meningitis germs, and that these germs were communicated to the later victims from droplets of excretions from the nose and throat of such persons. The following appears from the statement of Dr. W. H. Tucker, Assistant Epidemiologist, in a report to Dr. Jirka, Director of Public Health:

"When the investigation was first started we were not sure that anyone in connection with the Transient Bureau had anything to do with the outbreak, but subsequent developments indicated that some one in the shelter most likely was the source of the first cases * * * when cultures were made from the throats of three hundred men who were thereafter quarantined in the transient camps at Springfield it was found that four of them were carriers of these germs. No carriers were found in a group of more than one hundred townspeople who had attended the program. The carriers were isolated and placed under medical treatment, and their carrier condition was overcome in one week * * * The quarantine of the two shelters and the isolation of the carriers was effective in checking the outbreak in the Federal Transient Bureau and no new cases have appeared in the shelters since that time."

This is decidedly a borderline case. The claimant herein was in attendance at such camp because of his duties. Claimant and respondent at the time of the former's employment were both within the terms of the Workmen's Compensation Act and bound thereby. Do the facts disclose "an injury resulting from an accident which arose out of and in the course of plaintiff's employment?" No accident in the common

acceptance of the term is shown to have occurred, but under certain circumstances spinal meningitis, incurred in the course of the performance of one's employment, has been held to constitute an accidental injury.

In the case of *Arquin vs. Ind. Comm.*, 349 Ill. 220, we find that Dr. Arquin, while on duty as an interne in the Contagious Ward of the Cook County Hospital, contracted epidemic meningitis which caused his death. In submitting a claim in that case the widow contended that epidemic meningitis was an accidental injury for which compensation should be allowed. It was there said,

"The evidence is undisputed that epidemic meningitis is highly contagious and that Arquin was continuously engaged in the treatment of patients suffering from that disease, from December 1st to December 6th, when he himself contracted the disease. The origin of his illness and death arose while he was performing his duties in the regular course of his employment. The infection constituted his injury * * * The specific time when the meningitis germ entered his body is unascertainable, but since he was in constant contact with this dreaded disease for six days until he himself was stricken, the evidence seems reasonably sufficient to support a finding that he died as a result of an accidental injury which arose out of and in the course of his employment * * * The proof clearly shows his death was the proximate result of the infection with meningitis a few days prior. This case is therefore to be distinguished from those cases where the connection between the death and accidental injury is remote and difficult to trace as to time and place of origin."

The following views were expressed in *Rissman and Son vs. Ind. Comm.*, 323 Ill. 459:

"Typhoid fever has been regarded as accidental if the disease is contracted by accidental means; that an accident may be said to be 'an unforeseen or unexpected event of which the party's own misconduct is not the natural and proximate cause,' and that the result ordinarily and naturally flowing from the conduct of the party cannot be said to be accidental."

From the foregoing decisions it appears that meningitis, contracted under certain conditions may be said to constitute an accidental injury, as used in the Workmen's Compensation Act.

As the statement herein submitted however discloses as a positive fact that carriers of the spinal meningitis germs were found to be present in the group of men among whom claimant worked in the course of his employment, and as tests made of more than one hundred townspeople who were not residents of such Transient Camps, disclosed no meningitis car-

rier among them, we believe the record sufficiently shows that claimant contracted the disease in the course of his duties and that same constituted an accidental injury which arose out of and in the course of his employment.

Plaintiff's wages appear to have been Seventy-five (\$75.00) Dollars per month at the time of his injury, or on the basis of Seventeen and 30/100 (\$17.30) Dollars per week, of which Fifty Per Cent (50%) would be Eight and 65/100 (\$8.65) Dollars. He remained in the hospital from January 26, 1935 until the 28th day of February, 1935 and was thereafter taken to his home, where he was bedridden for the following six weeks. While he was employed to some extent thereafter, the statement of Dr. Franklin Maurer, appearing in the record, states that claimant's temporary disability terminated on or about December 1, 1935. An allowance at the rate of Eleven Dollars per week for forty-four (44) weeks to December 1, 1935 based upon 50% plus allowance on account of one child under sixteen years, would amount to Four Hundred Eighty-four (\$484.00) Dollars. The record discloses that claimant is now employed by the Old Age Assistance Service at One Hundred Sixty (\$160.00) Dollars per month, which is more than double the wages he was receiving at the time of his injury, and no award can be justified for any permanent disability. The only award that appears to be possibly justified is the allowance for temporary total disability, in an amount not to exceed Four Hundred Eighty-four (\$484.00) Dollars. Your Commission would apparently be justified in paying such latter sum to claimant, but not in paying claimant the sum of Five Hundred Eighty-five (\$585.00) Dollars, indicated in your statement as being the amount which claimant and his attorney have offered to accept in full settlement of his claim.

As it appears that the claim now under consideration is the same as that now filed in the Court of Claims under the title of *Harry K. Steelman vs. State of Illinois*, No. 2744, any settlement of the present claim should be conditional upon the dismissing of the latter entitled cause, and settlement should be made from any funds now held by the Illinois Emergency Relief Commission and allocated for the payment of such claims.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 24.

Payment of \$600.00 advised.

JULS LOCK, Claimant, vs. ILLINOIS EMERGENCY RELIEF COMMISSION,
Respondent.

Opinion filed July 23, 1937.

STATEMENT OF FACTS.

Juls Lock, 2508 West Lake Street, Chicago, Illinois, claims to have sustained an injury on the 23rd day of August, 1934, to his head while working as a laborer for the Illinois Emergency Relief Commission on Project No. S1-B2-1. Said project provided for the following work:

"Work to be embraced in this project shall include widening and construction at shoulders, reconstructing ditches, flattening slopes, daylighting intersections and curves, quarrying flagstone, constructing stone gutters, stone retaining walls and head walls, riprapping steep slopes, preparing grounds for planting, planting and caring for trees and shrubs, trimming trees, removing stumps, laying sod, sowing grass seed, constructing stone and cinder sidewalks, constructing fences, constructing and painting guard fences, patching and maintaining pavement, laying tile, constructing and repairing catch basins and culverts, painting bridges, maintaining roadway signs, mowing roadsides, unloading and handling materials to be used on various state roads in Cook County, dressing and maintaining tools to be used for work as listed, and keeping accurate cost records and distribution on all work."

Said project was instituted on or about the 19th day of July, 1934, and was continued until work was completed on November 12, 1934. The total cost of said project was \$263,538.05. This amount included labor and materials. Of this amount, \$196,040.00 was provided by the Illinois Emergency Relief Commission and the remainder was furnished by the Division of Highways of the State of Illinois. Said project requested by Kendrick Harger, District Engineer, Division of Highways of the State of Illinois, and was sanctioned by him and A. R. Lord, Illinois Emergency Relief Commission State Administrator of Work Relief.

The Illinois Emergency Relief Commission was created by an Act of the General Assembly of the State of Illinois effective February 6, 1932. The duties of the Illinois Emergency Relief Commission under this said Act at the time of the claimant's alleged injury and prior to July 1, 1936, were specified to be as follows:

Powers and duties. It shall be the duty of the commission until March 1, 1937, to provide relief to residents of the State of Illinois, who, by reason

of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any other means deemed desirable by the commission. For the purpose of carrying out the provisions of this Act, the commission may make use of and co-operate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission has created many departments within itself since its creation through which relief is administered; such as maintenance department, furniture shops, mattress factories, canneries, work relief divisions and other divisions or departments too numerous to mention. Said maintenance department has charge of maintenance work in all buildings operated by the Illinois Emergency Relief Commission. Said work includes plumbing, carpentry, janitor work, engineering, and general repair work. Said furniture shops manufacture furniture which is used in relief offices throughout the State. Said mattress factories manufacture mattresses for relief recipients and for shelters operated by the Illinois Emergency Relief Commission. Said canneries preserve vegetables and fruits which have been grown by relief recipients on Illinois Emergency Relief Commission soil. Said work relief divisions furnish men to the state highway department, counties, townships, cities and parks for general maintenance work. All of the above enterprises or projects use sharp-edged cutting tools such as saws, chisels, mattocks and axes. Said buildings operate electric motors, elevators and boilers, all of which are governed by municipal ordinances.

Claimant was assigned to work on said project on or about the 7th day of May, 1934, as a laborer. Claimant worked approximately forty-two (42) hours a month and received Twenty-one Dollars (\$21.00) for his services. On this particular assignment, claimant was assigned to work on August 19, 1934, for forty-two (42) hours. Said work was to terminate August 23, 1934.

Claimant was directed by R. H. Jones, timekeeper on said project, to assist other men in hauling material from one section of the project to another. On the day heretofore mentioned, claimant and three other men were riding on a State of Illinois Department of Highways truck and at the corner of Division and Harlem Avenues the truck turned to the right and claimant lost his balance. As a result, claimant

was pitched to the pavement, striking the left side of his head. Immediately after the accident, claimant was taken to the State Hospital at Dunning and attended by Dr. Kilgour, who rendered first aid treatment. The tentative diagnosis at this time was possible skull fracture. Dr. Kilgour recommended complete rest. About two hours after the treatment was rendered, claimant was removed to his home by a police ambulance. See Exhibit I.

Dr. Michael S. Corbett, 1380 West Lake Street, Chicago, Illinois, informed the Illinois Emergency Relief Commission that he had treated claimant for approximately six months for dizziness and headaches he claims were the result of an injury he sustained on August 23, 1934, when he fell from a truck while working for the Illinois Emergency Relief Commission. X-rays were taken and diagnosis was that claimant was suffering from a right stellate fracture of the frontal skull. Claimant also received treatment at the Cook County Hospital, Chicago, Illinois, where records of claimant are not available.

Claimant was requested to submit to a medical examination on May 7, 1937. Dr. George M. Hall, outstanding neurologist in the City of Chicago, examined claimant and found that he was suffering from cerebral commotion with post-traumatic headache and dizziness. See Exhibit II.

Claimant's accident was witnessed by Herman Wusterbarth, who was working with him at the time of the accident. It was impossible to secure a statement from Mr. Wusterbarth since he could not be located.

All medical and hospital bills have been paid by the Illinois Emergency Relief Commission.

Claimant's accident was in the course of, and arose out of, his employment. Further, the Illinois Emergency Relief Commission had notice of the accident and demand for compensation was made within six months after the accident on his employer.

In the course of claimant's work, sharp-edged cutting tools were used such as saws, picks, mattocks, pneumatic hammers and gasoline driven cement mixers.

At the time of the accident, claimant had no children under sixteen years of age.

Section 3, paragraph 8, of the Workmen's Compensation Act of the State of Illinois provides:

"In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra hazardous * * *."

Section 8, paragraph (a), of the Workmen's Compensation Act of the State of Illinois provides:

"The employer shall provide the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury * * *."

Section 8, paragraph (c), of the Workmen's Compensation Act of the State of Illinois provides:

"For injuries in the following schedule, the employee shall receive compensation for the period of temporary total incapacity for work resulting from such injury, in accordance with the provisions of paragraphs (a) and (b) of this section, for a period not to exceed sixty-four weeks, and shall receive in addition thereto compensation for a further period subject to limitations as to amounts as in this section provided, for the specific loss herein mentioned, as follows, but shall not receive any compensation for such injuries under any other provision of this Act."

Juls Lock claims that he has been a laborer all of his life and that as a result of the accident he has not been able to work as a laborer; that from 1927 to 1929 he received Seven Dollars (\$7.00) a day as wages for his services but that for the past five years he has been receiving relief and working only on his assignments; that since the alleged accident he has been assigned on two different occasions but was unable to fulfill the assignments because of dizzy spells and severe headaches he suffers upon exertion.

Section 8, paragraph (d), of the Workmen's Compensation Act of the State of Illinois provides:

"If, after the injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall, except in the cases covered by the specific schedule set forth in paragraph (e) of this section, receive compensation, subject to the limitations as to time and maximum amounts fixed in paragraphs (b) and (h) of this section, equal to fifty per centum of the difference between the average amount which he earned before the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident"

Medical examinations and doctors' reports show that Juls Lock still has a minor disability as a result of the accident and is not able to do heavy work.

Claimant filed a petition in the Court of Claims which is known as *Juls Lock vs. State of Illinois*, No. 2674. Said

cause is now pending before the court. A stipulation to dismiss the above entitled cause has been filed in the Court of Claims.

A release and waiver has been secured from the claimant and he and his attorney have agreed to accept Six Hundred Dollars (\$600.00) in full settlement of his injuries.

**ILLINOIS EMERGENCY RELIEF COMMISSION.
MEDICAL SERVICE REPORT OF WORK RELIEF INJURED AND ILLNESSES.**

Date *August 27, 1934.*

Patient's Name—Lock Jule; Project—12th and Austin Gang on Highway, Melrose Park.

Wife's Name

Address—2122 Fulton St.

Patient's Complaint—Fell off truck, hurt head on 23rd, given first aid at Melrose Park Hospital. Severe headache, small linear fracture right temple region.

Has patient seen a physician? Yes. Name of physician—Dr. Corbett. Address of physician—1380 W. Lake St., Monroe 0029. Should be kept quiet week or two. Should be seen.

District from which client receives relief—Main

Source of Report.....

Time Receivedby.....

Social Service Exchange:.....

Report from District—Will have case worker check and follow thru.

Action taken by Medical Relief Service—Dr. Corbett called to report pt. came to his office this morning complaining of severe headache. Doctor took stereoscope of skull and discovered a small linear fracture, right temple.

Main

8/24—9/6

Proj. 1 Schedule 25528

8/27/6—M LT

Form 533 M.

Exhibit 1

ILLINOIS EMERGENCY RELIEF COMMISSION.

PRELIMINARY REPORT OF ACCIDENT.

Report immediately in duplicate to Workmen's Protection Dept., 1319 S. Michigan Ave., Chicago, Ill.

Local Government Unit: State of Illinois, Div. of Hwy.
Proj. No. B-2-1.

Office Address: Street and No.—35 E. Wacker Drive;
County—Cook; City or Village—Chicago.

Employer, Nature of Work—Maintenance Service Roads.

Place and Time Location of place where accident happened, Street and
No.—Harlem Ave. and Division St.; County—Cook;
City or Village—Chicago.

Date of Accident—August 23rd, 1934. Hour of Day
8:30 A. M.

| | |
|---|---|
| Injured Worker | Name of Employer—Lock Juls; Address—2122 Fulton St.; Age:; Sex—Male; Speak English—Yes. Nationality—American; Colored. |
| | Identification No.....Single..... Married.... |
| | Occupation when injured—Laborer. |
| | Was this regular occupation?.....Relief work. |
| | Wages or average earnings per day—\$3.50. |
| | Working hours per day—7; Working hours per week—21; Per month—84; Average weekly wages—\$10.50 |
| | How long employed?..... |
| | How many children under 16 years of age has injured?.....; Give age of each..... |
| | Did injury cause loss of any member or part of member? |
| | If injured under sixteen years have you his school certificate on file?..... |
| Cause (Use back of form if more space is needed) | Describe in full how accident happened—At Division at Harlem this man lost his balance and fell off truck Names and addresses of witnesses to the accident Wusterbarth, Herman, 3512 N. Leavitt St., Chicago Name of machine, tool or appliance in connection with which accident occurred—Truck No. 1049; by what power driven—gas; hand feed or mechanical feed, part on which accident occurred—Rear End. |
| | |
| Nature and Extent of Injury | State exactly part of person injured and nature of injury—Laceration of left ear (Dr. Kilgour is on his vacation. The Drs. on duty at State Hospital, would not issue any information regarding this man. Did injury cause loss of any member or part of members—No. If so, describe exactly..... |
| | |
| | |
| Lost Time | Attending physician or hospital where sent—Dr. Kilgour; Name and address—State Hospital, Dunm... Has injured employee returned to work? No If so, give date.....; Has any relief or other monetary assistance been given?.....Amount... Amount paid for hospital or medical services, if any \$..... |
| | If Fatal—Date of employee's death: Length of disability before death... Single or married..... Name and P. O. Address of a relative or friend of the deceased..... |
| | |
| | |
| | |

Date of this report: August 30th, 1934. Made out by R. H. Jones
 Title: Timekeeper.

DR. GEORGE W. HALL.
DR. R. P. MACKAY.

WILLOUGHBY TOWER
8 SO. MICHIGAN AVENUE
Chicago

May 7, 1937.

Mr. R. C. Eardley
Ill. Emergency Relief Comm.
Chicago, Ill.

Re: JULES LOCK

DEAR MR. EARDLEY: I wish to give the following report of my examination of Jules Lock of 2508 W. Lake Street whom you referred to me today. This patient is 34 years of age and gave a history that he received an injury to his head on August 23, 1934. At that time he was working on a relief job in Franklin Park. He stated that he was riding on the back end of a truck and the truck took a turn to the right with the result that he was jolted off the truck and struck his head on the pavement. He stated that he could remember falling and that the right side of his head struck the ground. Although he was rendered unconscious by the fall he maintained that he could remember the blow. He thought he was unconscious for about twenty minutes, but could not remember having been carried by his companions on the truck to the first aid station where he regained consciousness. He stated that there was no scalp wound. Some policemen came and took him home in a car following his recovery of consciousness. He remained sitting on the front steps of his house for about an hour and then took a street car alone to a physician's office. He had to walk about two blocks on this trip. The physician made an x-ray of the skull which revealed a fracture. He later went to the Cook County Hospital Outpatient Department where another x-ray was made which revealed the same findings. He received medication at the clinic which gave him some relief from a pain which he had in his head. At the present time the patient complains of a headache on the right side of his head. This headache comes on only occasionally and is apt to occur following any exertion, sudden bending over, etc. He also complains of dizziness which is likewise made worse by bending over, turning suddenly on attempting to work. This dizziness is described as a feeling of impending collapse or faintness and is apparently not a rotary vertigo. He stated that he had no other complaints other than headache and dizziness.

Neurological Examination revealed no objective abnormalities. The cranial nerves were all intact. The pupils reacted well to light and in accommodation. The optic fundi were normal as were the visual fields. There was no paralysis of the face. His hearing was within normal limits, although there was a slight reduction on the right. There was no abnormality of speech, swallowing. The motor system was normal throughout the whole body, as regards power, tone and speed. There was no atrophy. All tendon reflexes, as well as superficial reflexes were normal, and there was no disturbance of any form of sensation to be found. His gait and station were normal. The Romberg sign was negative, even when performed on one foot. I could detect no emotional abnormalities which would indicate the presence

of a neurosis and no tendency to exaggerate his symptoms, such as one finds in cases of malingering or neurosis.

Diagnosis in my opinion, is cerebral commotion with post-traumatic headache and dizziness. The symptoms as described by the patient are quite typical of these seen in other cases and are generally accepted as being due to the effects of the blow rather than to emotional or nervous factors. The prognosis is good, although these patients some times require a long time to recover. It would be wise to have his physician give him ammonium chloride, grains 15, t. i. d. and to restrict his intake of salt to a minimum. It is better for this patient to do as much work as possible short of increasing his disability, and he should be encouraged as to the outcome.

Very truly yours,

Signed: R. P. MACKAY.

Exhibit II.

ADVISORY OPINION BY MR. JUSTICE YANTIS.

To the Illinois Emergency Relief Commission:

Pursuant to your request for an Advisory Opinion, based upon the attached statement of facts submitted by you in the matter of the claim of *Juls Lock vs. Illinois Emergency Relief Commission*, the following Opinion is rendered, based upon the aforementioned statement:

We find that at the time of the accident in question, both employer and employee were operating under and bound by the provisions of the Illinois Workmen's Compensation Act; that said accident arose out of and in the course of such employment.

The facts submitted in the statement show that Juls Lock was employed as a laborer on a project in which the I. E. R. C. was an interested party; that on August 23, 1934 he was engaged in hauling material, and while riding on an Illinois Department of Highways truck at the corner of Division and Harlem Avenue in the City of Chicago, he lost his balance and fell, striking the left side of his head on the pavement. He was immediately taken to the State Hospital at Dunning, where he was found to have a slight skull fracture. He thereafter received X-ray examinations and treatment at the Cook County Hospital, and on May 7, 1937 was examined by Dr. George M. Hall of Chicago. From your statement it appears that all of his medical and hospital bills have been paid by the I. E. R. C.; that claimant was unable to work for a consider-

able period following his accident, and is still suffering from the results thereof, having occasional headaches and a dizziness when bending over or suddenly turning. Dr. R. F. Mackey states that it is better for the patient to do as much work as possible, insofar as same does not increase his disability. Your statement further shows that this is the same claim as that involved in the case of *Juls Lock vs. State of Illinois*, now pending in the Court of Claims under No. 2674; that claimant has been duly advised by his attorney, and that they have agreed to accept Six Hundred (\$600.00) Dollars in full settlement of any rights which he may have, growing out of said accident.

While no sufficient showing as to present earning capacity appears, from which an accurate determination may be made as to the difference between what claimant was able to earn before the accident and the average amount which he is earning or is able to earn in some suitable employment since such accident, yet the facts are sufficient to show that both for the time lost by claimant following the accident and his present condition, such allowance would not be less than the Six Hundred (\$600.00) Dollars which your report shows claimant and his attorney are willing to accept in full satisfaction.

We therefore find, that under the terms of the Workmen's Compensation Act claimant would be entitled to the sum of at least Six Hundred (\$600.00) Dollars for injuries and loss of time resulting from said accident, and that a payment of said sum by the Illinois Emergency Relief Commission in full settlement is fully authorized under the terms of the Workmen's Compensation Act.

Payment of such claim should be subject: First, to a dismissal of the claim of *Juls Lock vs. State of Illinois*, No. 2674, now pending in the Court of Claims; and Second, the payment of such sum shall be made by the Illinois Emergency Relief Commission out of any funds held by it and allocated for such purpose.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 25.

Settlement of claim for \$131.25, upon certain showing, advised

DAN DUNBAR, Claimant, vs. ILLINOIS EMERGENCY RELIEF COMMISSION,
Respondent.

Opinion filed August 23, 1937.

STATEMENT OF FACTS.

Dan Dunbar, 4507 North Lincoln Avenue, Chicago, Illinois, claims to have sustained an injury on the 16th day of April, 1934, to his right knee while working as a carpenter for the Illinois Emergency Relief Commission, Maintenance Department, on Project No. S1-B4-398. Said project was maintenance and construction work which provided for personnel for maintenance and construction department at headquarters of the Illinois Emergency Relief Commission, 1319 South Michigan Avenue, Chicago, Illinois, and at the Chase Park Relief Office, 4410 Ravenswood Avenue, Chicago, Illinois. Said department took care of alteration and repair work for the following relief agencies: Main office at 1319 South Michigan Avenue, Chicago, Illinois; Personnel office at 1222 South Michigan Avenue, Chicago, Illinois; Unemployment Relief Service in Cook County; Cook County Bureau of Public Welfare in Cook County; Shelters in Cook County; Transient Home in Cook County; Mattress and Comforters Factory; Tool Department in Cook County; Warehouse in Cook County; furniture in all relief offices in the State; also the building of furniture for nursery schools. Said project was instituted on or about the 13th day of April, 1934, and was completed on or about the 1st day of November, 1934. The total cost of said project was \$401,917.60. Said amount included labor and materials. All monies for said project were furnished by the Illinois Emergency Relief Commission. This project was requested by the Illinois Emergency Relief Commission for maintenance and construction work and was approved by Leo M. Lyons, Administrator of Cook County, and A. R. Lord, Illinois Emergency Relief Commission State Administrator of Work Relief.

The Illinois Emergency Relief Commission was created by an Act of the General Assembly of the State of Illinois effective February 6, 1932. The duties of the Illinois Emergency Relief Commission under this said Act at the time of

the claimant's alleged injury and prior to July 1, 1936, were specified to be as follows:

Powers and duties. It shall be the duty of the commission until March 1, 1937, to provide relief to residents of the State of Illinois, who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any other means deemed desirable by the commission. For the purpose of carrying out the provisions of this Act, the commission may make use of and co-operate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission has created many departments within itself since its creation through which relief is administered; such as maintenance department, furniture shops, mattress factories, canneries, work relief divisions and other divisions or departments too numerous to mention. Said maintenance department has charge of maintenance work in all buildings operated by the Illinois Emergency Relief Commission. Said work includes plumbing, carpentry, janitor work, engineering, and general repair work. Said furniture shops manufacture furniture which is used in relief offices throughout the State. Said mattress factories manufacture mattresses for relief recipients and for shelters operated by the Illinois Emergency Relief Commission. Said canneries preserve vegetables and fruits which have been grown by relief recipients on Illinois Emergency Relief Commission soil. Said work relief divisions furnish men to the state highway department, counties, townships, cities and parks for general maintenance work. All of the above enterprises or projects use sharp-edged cutting tools such as saws, chisels, mattocks and axes. Said buildings operate electric motors, elevators and boilers, all of which are governed by municipal ordinances.

Claimant was assigned to work on or about the 13th day of April, 1934. He had been assigned to other projects previous to the date above mentioned. Claimant worked approximately eight (8) hours per day and for his services received Ten Dollars and Fifty Cents (\$10.50).

Claimant was directed by one D. Crumlish, superintendent of the carpenters, to work on a well hole which was being constructed in the building at 1304 Indiana Avenue, Chicago, Illinois. Said building was to be used as administrative headquarters for the Illinois Emergency Relief Commission. Said

well hole was being constructed on the second floor of said building. The work necessitated the use of ladders and scaffolds. On the day heretofore mentioned, claimant stepped from the first floor on to the scaffold, which was approximately twelve (12) feet high. Said scaffold was constructed of two by four (2x4) boards and two by ten (2x10) planks which were used as a runway. When claimant put his full weight on to the scaffold, one end gave way. As a result, he fell to the floor, striking his right knee, hip and shoulder. Immediately after the accident, he was examined by other carpenters and D. Crumlish. Shortly thereafter, he was taken to St. Luke's Hospital, Chicago, Illinois, for first aid treatment.

Records of St. Luke's Hospital show that claimants received first aid treatment in said hospital on the day heretofore mentioned. Injuries consisted of a slight abrasion of the right lateral surface of the right knee and a slight abrasion of the under surface of the chin. See Exhibit I.

After first aid treatment was rendered, claimant went back to D. Crumlish, but as a result of the shock, he could not complete his day's work. He was taken home in a taxicab, where he remained until May 31, 1934. During this time he was confined most of the time to his bed.

M. A. Greenberg, timekeeper for the Illinois Emergency Relief Commission, made a preliminary accident report at the time of the injury. See Exhibit II.

William Forsyth, a co-worker on said project, stated that he witnessed claimant's accident. See Exhibit III.

D. Crumlish and Harry Morse also witnessed the accident but it was impossible to secure statements from them because their present whereabouts are unknown.

In the course of claimant's work, sharp-edged cutting tools were used, such as chisels, saws, axes, and pneumatic hammers. There were also electric engines and boilers and four electrical elevators in said building.

Claimant claims that he was not able to do any work until the 15th day of September, 1934, and at that time he was only able to do light work because every time he lifted anything heavy, he would suffer severe pains in his right knee.

Payment of medical bills has been made by the Illinois Emergency Relief Commission.

Claimant's accident was in the course of, and arose out of, his employment. Further, the Illinois Emergency Relief

Commission had notice of the accident and demand for compensation was made on his employer within six months after the accident.

At the time of the accident, claimant had no children under sixteen (16) years of age.

Section 3, paragraph 8, of the Workmen's Compensation Act of the State of Illinois provides:

"In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra hazardous * * *

Section 8, paragraph (a), of the Workmen's Compensation Act of the State of Illinois provides:

"The employer shall provide the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury * * *

Section 8, paragraph (c), of the Workmen's Compensation Act of the State of Illinois provides:

"For injuries in the following schedule, the employee shall receive compensation for the period of temporary total incapacity for work resulting from such injury, in accordance with the provisions of paragraph (a) and (b) of this section, for a period not to exceed sixty-four weeks, and shall receive in addition thereto compensation for a further period subject to limitations as to amounts as in this section provided, for the specific loss herein mentioned, as follows, but shall not receive any compensation for such injuries under any other provision of this Act."

Claimant has filed a petition in the Court of Claims which is known as *Dan Dunbar vs. State of Illinois*, No. 2516. Said cause is now pending before the court. A stipulation to dismiss the above entitled cause has been filed in the Court of Claims.

Claimant and his attorney have agreed to accept One Hundred Thirty-one Dollars and Twenty-five Cents (\$131.25) in full settlement for his injuries. A release and waiver has been secured from claimant.

PHYSICIAN'S REPORT.

Report immediately in duplicate to the Local County Work Relief Superintendent.

IMPORTANT NOTE: Major operations, unless imperative must not be performed without first informing the County Emergency Relief Committee, in

order to give them an opportunity to participate in arrangements for hospital and other expense, also to furnish medical and surgical consultation if deemed necessary.

IMPORTANT: In describing injuries, please complete chart on reverse side and observe the following instructions:

Amputations relating to Hands and Feet—Specify by surgical name the number of every entire joint and portion of joint that is lost, including carpal, metacarpal, tarsal and metatarsal articulations, if any involved, using the terms, "thumb, first, second, third and fourth finger, great toe, first, second, third and fourth toes," and whether on right or left member.

Contusions—Single or multiple, superficial or deep, with locations, complications, etc.

Fractures—Give names of the bones and location; whether simple, double, compound, comminuted, and complications or dislocations, with joints involved.

Name of Injured Worker—Dunbar, Dan.

Residence Address—4609 N. Claremont Ave., Chicago, Cook County.

Age—55; **Sex**—Male; **Single**—.....; **Married**—X; **No. of children**

Project No......; **Employing Agency**—Ill. Emergency Relief Com., 1319 S. Michigan Ave.

At Whose request did you take care of this case?—Ill. Emerg. Relief, 1319 S. Michigan Ave.

Date and Time of your first examination—April 16, 1934.

Where was the examination made?—St. Luke's Hospital.

Injuries consist of?—Slight abrasion of R. lateral surface of R. Knee. Slight abrasion of under surface of chin.

When, in your opinion, were these injuries sustained?—April 16, 1934.

By what means, in your opinion, were these injuries sustained?—Fall from scaffold.

Have you observed any physical impairment not the result of the above injuries? If so, what?—No.

Explain fully medical or surgical procedure or treatment up to and including this date.

To what date do you deem further treatment necessary? Describe character and frequency.

How many days, in your opinion, should injured lose from date of accident before he can resume his regular work?.....

In your opinion, will the injuries result in death, loss of limb, sight, or any impairment of function? Explain fully......

Lacerations and Cuts—Location, single or multiple, extent, number of sutures required, muscle, nerves, blood vessels involved, if any.

Hernia—Describe whether direct, indirect, inguinal, femoral, umbilical or congenital type, and right or left side or both.

SPECIALLY IMPORTANT

In case of injuries to the Eye, Hernia, Fractures, Internal Injuries and all other cases requiring operative surgery, it is imperative that you first telephone the County Work Relief Superintendent for instructions, giving your opinion of the necessity for same.

Use X-Ray when necessary.

Date of this Report - Feb. 27, 1935.

Signed - St. Luke's Hospital; Telephone - Cal. 4040.

Address - 1416-1442 Indiana Ave., Chicago, Cook County.

Please send this report to the County Work Relief Superintendent,
immediately.

Exhibit I.

EXHIBIT.

ILLINOIS EMERGENCY RELIEF COMMISSION.

PRELIMINARY REPORT OF ACCIDENT.

Report in Duplicates to Workmen's Protection Dept, 1319 S. Michigan Ave., Chicago, Ill.

| | |
|------------------------------------|---|
| Employer Place and Time | <p>Local Governmental Unit: Illinois Relief Proj. No. 1535. Office Address: Street and No.: 1319 So. Michigan Avenue. County: Cook. City or Village: Chicago. Nature of Work: Building forms for fireproofing steel at first floor level. Location of Place where accident happened—Street and No.: 1319 S. Michigan Ave. County: Cook. City or Village: Chicago, Illinois. Date of Accident: April 16th, 1934. Hour of Day: 10:30 o'clock a. m.</p> |
|------------------------------------|---|

| | |
|-------------------------|--|
| Injured Employee | <p>Name of Employee: Dan Dunbar. Address: 4609 N. Claremont Ave. Age: 55. Sex: Male. Speak English? Yes. Nationality: Identification No. 2512. Single: Occupation when injured: Carpenter. Was this regular occupation? Yes. Wages or average earnings per day, \$10.50. Working hours per day: 8. Working hours per week: 40. Per month: <i>Average weekly wages</i> How long employed: Started April 5th, 1934. If injured under sixteen years have you his school certificate on file?</p> |
|-------------------------|--|

| | |
|---|---|
| Cause (Use back of form if more space is needed) | <p>Describe in Full How Accident Happened: Foot slipped from form lumber, fell between concrete wall and metal tank N. E. corner of building distance of about 10 ft. Names and addresses of witnesses to the accident: Harry Morse, 6143 N. Mozart Street. Name of machine, tool or appliance in connection with which accident occurred: .....by what power driven: .....hand feed or mechanical feed: .....part on which accident occurred:</p> |
|---|---|

State Exactly part of person injured and nature of injury: Right leg at knee cap injured.
 How many children under 15 years of age has injured?.....
 Nature and Extent of Injury Give age of each:..... Did injury cause loss of any member or part of member? If so, describe exactly:
 Days lost from work on account of accident:.....
 Attending physician or hospital where sent: Dr. Hutchinson. Name and address: St. Luke's hospital, 14th and Michigan Ave.
 Has injured employee returned to work? If so, give date: Has any relief or other monetary assistance been given?.....Amount.....
 Amount paid for hospital or medical services, if any \$.....
 Lost Time If Fatal: Date of Employee's death.....
 Length of disability before death.....
 Single or married.....
 Name and P. O. Address of a relative or friend of the deceased:.....
 Date of this report: April 16th, 1934. Made out by M. A. Greenberg. Title: Timekeeper. Signed: M. A. Greenberg.

Exhibit II

EXHIBIT.

March 30, 1935.

William Forsyth, 1108 North Karlov Avenue, Chicago, Illinois, states that on April 16, 1934, while working in the building at 1304 Indiana Avenue, he was a witness to Dan Dunbar's accident.

Mr. Forsyth further states that he has known Mr. Dunbar for 15 years prior to said accident; that they have worked together many times on different jobs.

Mr. Forsyth states that Mr. Dunbar was his partner on the date aforesaid; that they were assigned to re-enforce the beams on the first floor of said building; that they were working over a well hole which had been cut to the first floor for a stairway; that Mr. Dunbar had stepped from the first floor on to a scaffold, which had been constructed three days previous by some other carpenters, and that said scaffold had been in use for the past three days by all of the carpenters on this job; that as soon as Mr. Dunbar stepped on said scaffold, it gave way, the result that he was thrown to the ground. It was later discovered that the scaffold had been moved by some of the steamfitters who were working in the basement. After the accident Mr. Dunbar was taken to St. Luke's Hospital for examination and the doctors there informed us that there were no broken bones, so Mr. Dunbar came back

to the building. He only stayed there a short while when he was ordered by one of the men in charge to go home.

At the time of the accident, Mr. Forsyth stated that he was employed by the Illinois Emergency Relief Commission, as a carpenter.

Signed: WM. FORSYTH.

RC:evh

Exhibit III

ADVISORY OPINION BY MR. JUSTICE YANTIS.

To the Illinois Emergency Relief Commission:

Pursuant to your request for an Advisory Opinion, based upon the attached statement of facts submitted by you in the matter of the claim of *Dan Dunbar vs. Illinois Emergency Relief Commission*, the following Opinion is rendered, based upon the aforementioned statement:

We find that at the time of the accident in question, both employer and employee were operating under and bound by the provisions of the Illinois Workmen's Compensation Act; that said accident arose out of and in the course of such employment.

The statement of facts submitted herein disclose that claimant was assigned to various duties as a carpenter, working approximately eight hours per day and receiving for his services Ten and 50/100 (\$10.50) Dollars per week; that on April 16, 1934 while employed on a Project for the Illinois Emergency Relief Commission at 1304 Indiana Avenue, Chicago, Illinois, a scaffold, upon which claimant was standing, broke, resulting in his falling about twelve feet, striking his right knee, hip and shoulder.

First-aid was rendered at St. Luke's Hospital and he was thereafter confined to his home until May 31, 1934. Except for his own statement that he was unable to do any work until September 15, 1934, the only evidence in the record of continued disability is to the effect that same terminated May 31st. If the evidence remaining in your files or your further investigation discloses that claimant was actually prevented by such accident from pursuing his usual and customary labors until September 15, 1934, he would be entitled under the terms of the Workmen's Compensation Act to One Hundred Fifty-Three and 75/100 (\$153.75) Dollars, and you would therefore be fully justified under the terms of the Workmen's

Compensation Act in making settlement with him in the sum of One Hundred Thirty-One and 25/100 (\$131.25) Dollars, that being the amount which he and his attorney have, according to your statement, agreed to accept in full settlement for injuries and loss of time resulting from such accident. Without such evidence and proof, and in the absence of a showing as to partial disability, the right to an award for temporary total disability would terminate May 31st, and would cover a period of six and one-half (6½) weeks, for such temporary total disability, in the sum of Forty-Eight and 75/100 (\$48.75) Dollars.

Any settlement made should be from funds allocated to the Illinois Emergency Relief Commission available for such purposes, and if settlement is made it should be conditioned upon the dismissal of the case of *Dan Dunbar vs. State, C. of C.*, No. 2516.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 26.

Settlement of claim for \$368.53, less any deductions found proper by Commission, on account of payments made to claimant, justified and found advisable.

ARTHUR EDWARD SEEMAN, Claimant vs. ILLINOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed September 15, 1937.

STATEMENT OF FACTS.

Arthur Edward Seeman, Winchester, Illinois, claims to have sustained an injury on the 13th day of July, 1936, to his right forearm and wrist while working as a financial clerk for the Scott County Emergency Relief Committee at 10 South Hill Street, Winchester, Illinois.

The duties of a financial clerk are to prepare financial statements for the Illinois Emergency Relief Commission showing disbursements which have been made by the local relief office. Also to interview clients who have been assigned to work relief. Also to make reports to the Illinois Emergency Relief Commission on the progress made on work relief projects throughout the county.

The Illinois Emergency Relief Commission was created by an Act of the General Assembly of the State of Illinois

effective February 6, 1932. The duties of the Illinois Emergency Relief Commission under this said Act at the time of the claimant's alleged injury were specified to be as follows:

Powers and duties. It shall be the duty of the commission until March 1, 1937, to provide relief to residents of the State of Illinois, who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any other means deemed desirable by the commission. For the purpose of carrying out the provisions of this Act, the commission may make use of and cooperate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission has created many departments within itself since its creation through which relief is administered; such as maintenance department, furniture shops, mattress factories, canneries, work relief divisions and other divisions or departments too numerous to mention. Said maintenance department has charge of maintenance work in all buildings operated by the Illinois Emergency Relief Commission. Said work includes plumbing, carpentry, janitor work, engineering, and general repair work. Said furniture shops manufacture furniture which is used in relief offices throughout the State. Said mattress factories manufacture mattresses for relief recipients and for shelters operated by the Illinois Emergency Relief Commission. Said canneries preserve vegetables and fruits which have been grown by relief recipients on Illinois Emergency Relief Commission soil. Said work relief divisions furnish men to the state highway department, counties, townships, cities and parks for general maintenance work. All of the above enterprises or projects use sharp-edged cutting tools such as saws, chisels, mattocks and axes. Said buildings operate electric motors, elevators and boilers, all of which are governed by municipal ordinances.

Records of the Illinois Emergency Relief Commission show that from September, 1933, to and inclusive of September, 1936, there have been 344 disorderly conduct and assault and battery cases involving caseworkers in the employment of the Illinois Emergency Relief Commission. Said assaults were perpetrated by relief recipients while investigators were trying to investigate whether or not these individuals were eligible for relief. Of the above number, 328 were prosecuted in the Criminal Courts throughout the State. Of said num-

ber, 215 were found guilty of the charges heretofore alleged and 35 of said number were found not guilty; 43 of said number were dismissed and 31 of said number were dismissed for want of prosecution; 3 of said number were discharged and then sent to psychopathic hospitals, and one individual was committed directly to a psychopathic hospital.

On the day heretofore mentioned, claimant was lowering a window in the relief office when the window frame dropped and the glass broke. As a result, claimant received deep cuts on his right forearm and wrist. The glass cut the extensor tendons of five fingers of his right hand. After the accident, claimant was immediately taken to Dr. William O'Reilly, Winchester, Illinois, who administered first aid. See Exhibit I. Dr. O'Reilly took claimant to Our Savior's Hospital, Jacksonville, Illinois. At said hospital, claimant was immediately taken to the operating room where he was placed under an anaesthetic and his wounds were dressed. See Exhibit II. Claimant was under the care of Dr. William O'Reilly until September 9, 1936. See Exhibit III.

Claimant was also under the care of Dr. Frank A. Norris and Dr. Reginald M. Norris, Jacksonville, Illinois. See Exhibit IV. Dr. Reginald M. Norris submitted a physician's report on August 17, 1936, showing the extent of claimant's injury. See Exhibit V.

Claimant was asked to submit to an examination to determine the extent of his disability. Dr. Thomas D. Masters, an outstanding industrial surgeon of Springfield, Illinois, examined claimant on March 9, 1937. At that time, he found that there was a ten (10) per cent disability of the right arm. See Exhibit VI.

Claimant's accident was witnessed by Temple Irwin Grout, a former employee of the Scott County Emergency Relief Committee, and by W. B. Lemme. See Exhibit VII and VIII.

As a result of the accident, claimant has incurred medical, hospital and doctors expenses in the sum of One Hundred Thirty-Four Dollars and Ninety-Eight Cents (\$134.98). Said doctor, hospital and medical bills have been examined and found to be reasonable for the services rendered. Eight Dollars and Thirty-Eight Cents (\$8.38) of the above amount was incurred by traveling expenses when claimant was asked by the Illinois Emergency Relief Commission to come to Spring-

field, Illinois, to submit to a medical examination so the extent of claimant's disability could be ascertained.

Claimant's accident was in the course of, and arose out of his employment. Further, the Illinois Emergency Relief Commission had notice of the accident and demand for compensation was made on his employer within six months after the accident.

In the course of claimant's work, electrically driven motors were operated in said building. There were also two steam boilers operating in the basement of said building.

At the time of the accident, claimant was unmarried.

Section 3, paragraph 8, of the Workmen's Compensation Act of the State of Illinois provides:

"In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra hazardous * * *"

Section 8, paragraph (a), of the Workmen's Compensation Act of the State of Illinois provides:

"The employer shall provide the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury * * *"

Claimant is not asking for temporary total disability as he received his full salary, which was Ninety Dollars (\$90.00) per month, during his period of disability.

Section 8, paragraph 13, of the Workmen's Compensation Act of the State of Illinois provides:

"For the loss of an arm, or the permanent and complete loss of its use, fifty per centum of the average weekly wage during two hundred and twenty-five weeks."

The report of Dr. Thomas D. Masters shows that there is a ten (10) per cent permanent complete loss of the use of claimant's right forearm.

Claimant has agreed to accept Four Hundred Seventy-Two Dollars and Forty-Eight Cents (\$472.48) in full settlement for his injuries. A release and waiver has been secured by the Illinois Emergency Relief Commission for the above amount.

PHYSICIAN'S REPORT.

Report immediately in duplicate to the Local County Work Relief Superintendent.

IMPORTANT NOTE: Major operations, unless imperative must not be performed without first informing the County Emergency Relief Committee, in order to give them an opportunity to participate in arrangements for hospital and other expense, also to furnish medical and surgical consultation if deemed necessary.

IMPORTANT: In describing injuries, please complete chart on reverse side and observe the following instructions:

Amputations relating to Hands and Feet—Specify by surgical name the number of every entire joint and portion of joint that is lost, including carpal, metacarpal, tarsal and metatarsal articulations, if any involved, using the terms, "thumb, first, second, third and fourth finger, great toe, first, second, third and fourth toes," and whether on right or left member.

Contusions—Single or multiple, superficial or deep, with locations, complications, etc.

Fractures—Give names of the bones and location; whether simple, double, compound, comminuted, and complications or dislocations, with joints involved.

Name of Injured Worker—Seeman, Edward Arthur.

Residence Address—Bluffs, Scott County, Illinois.

Age—27; **Sex**—Male; **Single**—X; **Married**.....; **No. of children**.....

Project No.—Office; **Employing Agency**—Ill. Emerg. Relief Commission.

At whose request did you take care of this case?—Arthur Seeman.

Date and time of your first examination—Monday, July 13, 1936 at 3:45 P. M.

Where was the examination made?—My office.

Injuries consist of?—Cutting of tendons extensor of right hand.

When, in your opinion, were these injuries sustained?—July 13, 1936, 3:45 P. M.

By what means, in your opinion, were these injuries sustained?—By window falling and a pane of glass fell out of frame hitting on arm.

Have you observed any physical impairment not the result of the above injuries? If so, what?—No.

Lacerations and Cuts—Location, single or multiple, extent, number of sutures required, muscle, nerves, blood vessels involved, if any.

Hernia—Describe whether direct, indirect, inguinal, femoral, umbilical or congenital type, and right or left side or both.

SPECIALLY IMPORTANT

In case of injuries to the Eye, Hernia, Fractures, Internal Injuries and all other cases requiring operative surgery, it is imperative that you first telephone the County Work Relief Superintendent for instructions, giving your opinion of the necessity for same.

Use X-Ray.

1. plain fully medical or surgical procedure or treatment up to and including this date--Compress applied taken to hospital for operation and ligation of tendons

2. What date do you deem further treatment necessary? Describe character and frequency--No definite date can be yet fixed change of dressing and observation.

How many days, in your opinion, should injured lose from date of accident before he can resume his regular work?--He returned to work on the sixth day to carry on some of his work.

In your opinion, will the injuries result in death, loss of limb, sight, or any impairment of function. Explain fully--No. No. No. The impairment can not be estimated now.

Date of this report--August 12, 1936.

Signed--Wm. O'Reilly, M. D.; Telephone--237.

Address--Carpenter Bldg., Winchester, Scott County, Illinois.

Please send this report to the County Work Relief Superintendent, immediately.

Exhibit I.

Copy

Jacksonville, Illinois, July 17, 1936.

Mr. Arthur Seeman

For hospital service

To Our Saviour's Hospital, Dr.
446 East State Street

| | |
|-------------------------------------|---------|
| Balance Acct. Rendered..... | ..... |
| Room, care, etc., 7/13 to 7/17..... | \$14.40 |
| Operating Room | 10.00 |
| Gas and Ether..... | 2.00 |
| Laboratory Fee | 2.50 |
| X-ray ..... | ..... |
| Medicine and Dressings..... | .70 |
| Nurses' Board ..... | ..... |
| Cast ..... | ..... |
| | <hr/> |
| | \$29.60 |

PAID
Our Savior's Hospital
Per Sr. Alice Marie

Exhibit II.

Jacksonville, Ill.
July 18, 1936

Seeman, Arthur

To E. D. CANATKEY, B. S., M. D.
409 Ayers Bank Building

Administering anaesthetic
For professional services to date.....\$10.00

Exhibit II.

COPY.
STATEMENT

Mr. Arthur Seeman

To: Dr. Wm. O'Reilly

Winchester, Illinois

| | | | |
|-------|----|--------------------|----------|
| July | 13 | to services hospt. | \$ 12.50 |
| " | 27 | Dressing Arm | 1.00 |
| " | 31 | " " | 1.00 |
| Aug. | 3 | " " | 1.00 |
| " | 4 | " " | 1.00 |
| " | 8 | " " | 1.00 |
| " | 14 | " " | 1.00 |
| " | 17 | " " | 1.00 |
| " | 21 | " " | 1.00 |
| " | 26 | " " | 1.00 |
| Sept. | 3 | " " | 1.00 |
| " | 9 | " " | 1.00 |

\$ 23.50

PAID

Exhibit III.

COPY.

*Jacksonville, Ill.
July 6, 1937*

Illinois Emergency Relief Commission:

In Account with
for Arthur Seeman
FRANK A. NORRIS, M. D.
and

REGINALD M. NORRIS, M. D.

| | |
|--|----------|
| To Professional Services to date | \$ 63.50 |
| July 13, 1936 to operation, Our Saviour's Hospital, De- bridement of Hand | \$ 50.00 |
| July 21, 23, 26, 29, Aug. 5, 11, 19, 21, 29, 1936, to dress ings at \$1.50 each | 13.50 |

Exhibit IV.

ILLINOIS EMERGENCY RELIEF COMMISSION.
1319 South Michigan Avenue Chicago, Illinois
SURGEON'S REPORT.

IMPORTANT NOTE: Major operations, unless imperative must not be per-
formed without first informing the Illinois Emergency Relief Commission.

order to give them an opportunity to participate in arrangements for hospital and other expense, also to furnish medical and surgical consultation if deemed necessary.

IMPORTANT: In describing injuries, please observe the following suggestions:

Amputations relating to Hands and Feet. Specify by surgical name the number of every entire joint and portion of joint that is lost, including carpal, metacarpal, tarsal and metatarsal articulations, if any involved, using the terms, "thumb, first, second, third and fourth finger, great toe, first, second, third and fourth toes," and whether on right or left member.

Contusions—Single or multiple, superficial or deep, with locations, complications, etc.

Fractures—Give names of the bones and location; whether simple, double, compound, comminuted, and complications or dislocations, with joints involved.

Lacerations and Cuts—Location, single or multiple, extent, number of sutures required, muscle, nerves, blood vessels involved, if any.

Hernia—Describe whether direct, indirect, inguinal, femoral, umbilical or congenital type, and right or left side or both.

SPECIALLY IMPORTANT

In case of injuries to the Eye, Hernia, Fractures, Internal Injuries and all other cases requiring operative surgery, you are urgently requested to first telephone the Workmen's Protection Department for instructions, giving your opinion of the necessity for same.

Use X-Ray when necessary.

How many children under 16 years:.....

Name of Injured Person—Seeman, Arthur Edward.

Age—27; Married or Single—Single.

Residence—Bluffs, Illinois.

Local Governmental Unit—Scott County Emergency Relief Comm., Proj. No. Office.

At whose request did you take charge of case?—Dr. Wm. O'Reilly.

Date of your first examination—July 13, 1936; Where?—Our Saviour's Hosp.

Injuries consist of—Lacerations completely severing all extensor tendons of five fingers of right hand.

When, where and by what means in your opinion, were these injuries sustained?—While putting down a window at the office the pane of glass fell out and broke cutting his right hand.

Have you observed any physical impairment not the results of the above injuries?—None.

Explain fully surgical procedure up to and including this date—Debridement and complete repair of tendons.

To what date do you deem further treatment necessary? Describe character and frequency?—?

How many days should injured lose from date of accident before he can resume his regular work?—?

Has injured returned to work?—Yes.

In your opinion will the injuries result in death, loss of limb, sight, or any impairment of function? Explain fully--?

Date of this report--August 17, 1936.

Signed--R. M. Norris, M. D.; Address--Jacksonville, Ill.; Phone--760.

Mail report to Workmen's Protection Dept., 1319 S. Michigan Ave., Chicago, immediately after first treatment. An additional report on this form is required when patient is discharged. Periodic reports required for protracted cases.

Exhibit V.

DRS. PATTON, EVANS AND HERNDON
Suite 612 Myers Bldg.,
Springfield, Illinois.

Dr. C. L. Patton
Dr. F. N. Evans
Dr. R. F. Herndon
Dr. D. J. Lewis
Dr. T. D. Masters

March 9, 1937

Illinois Emergency Relief,
2126 S. Dearborn St.,
Chicago, Ill.

Att'n: R. C. Eardley.

DEAR SIR: Mr. Arthur Seeman of Macomb, Illinois, consulted us today day.

He stated that in July 1936 he received a laceration of the dorsum of the right forearm by falling glass which severed the tendons of the arm and wrist.

There is an irregular, adherent scar approximately twelve centimeters long on the dorsum of the right forearm. There is no atrophy of the arm, wrist or hand. All movements in the wrist and hand are somewhat weaker but are accomplished, except extension of the wrist with simultaneous extension of the fingers. The former is accomplished, however, with the fingers flexed. There is no evidence of nerve injury.

The estimated disability of the right forearm is 10%.

Yours truly,

Signed: **THOS. D. MASTERS, M. D.**

TDM/SJ

Exhibit VI.

Winchester, Illinois
April 13, 1937.

TO WHOM IT MAY CONCERN:

On the afternoon of July 13, 1936, Mr. Arthur Seeman and I were engaged in lowering the windows in the Scott County office of the Illinois Emergency Relief Commission preparatory to closing the office for the day when the glass fell out of the south west window of the office in the building known as the "Townsend Building" severely cutting Mr. Seeman's right arm above the right wrist.

Signed: **TEMPLE IRWIN-GROUL.**

Exhibit VII.

Bluffs, Ill., July 3, 1937.

Mr. Robert E. Eardley,
1126 S. Dearborn St.,
Chicago, Ill.

DEAR MR. EARDLEY: This information is in reply to the request on opposite side of this paper.

The window sash in the building rented by the I. E. R. C. Winchester, Illinois, had up until Mr. Seeman's accident never been repaired with sash cord. The sash had to be held up by sticks.

On the night of July 13, 1936, (date as given by you, memory gone) at 7:00 o'clock p. m., Mr. Arthur Seeman proceeded to close the windows as was the custom for one of us to do at quitting time. The sash were very heavy, being I think 24" x 30" double strength. Holding the sash in one hand and removing the stick (support) with the other, the sash slipped from his hand fell suddenly and caused the clasp to break and fall out. A large piece of the upper part broken at an angle of about 30 to 45 degrees from a horizontal line came out and slid full break edge length down his wrist. I know this because I swept up the glass after the accident.

I was in an adjoining room. I heard him give a call of distress, after hearing the crash of the glass. I hurried to his assistance. He was holding his arm above the cut with the other hand. I hurried to get the bandage but before I got back he was down the stairs and ran a block to Dr. O'Riley's office. He was taken to the hospital in Jacksonville where the tendons were united by a surgeon.

Respectfully,

Signed: W. B. LEMME.

Exhibit VIII.

ADVISORY OPINION BY MR. JUSTICE YANTIS.

To the Illinois Emergency Relief Commission:

Pursuant to your request for an Advisory Opinion, based upon the attached statement of facts submitted by you in the above entitled matter, the following Opinion is rendered, based upon said statement. It appears that Arthur Edward Seeman was employed by the Illinois Emergency Relief Commission as a Financial Clerk in the Office of the Scott County Emergency Relief Committee at Winchester, Illinois; that in performing his service it was a part of his duty to interview work relief clients, prepare financial statements and to make reports of the progress of work relief throughout the County. It further appears that on the 13th day of July, 1936 while lowering a window in the Relief Office just prior to ending his day's work, a glass panel fell out of the frame, struck claimant's right forearm and wrist, and cut the extensor tendons of the five fingers of his right hand. He received

first-aid, was thereafter taken to the Hospital at Jacksonville, Illinois, was placed under an anaesthetic and his wounds were dressed. Thereafter he was under the care of Dr. William O'Reilly until September 9, 1936. He was also examined by Dr. R. M. Norris of Jacksonville, Illinois, on August 17, 1936, and by Dr. Thomas D. Masters, an Industrial Surgeon of Springfield, Illinois. The statement submitted by the several doctors shows a partial permanent disability of ten (10) per cent of the right arm. Medical, hospital and surgical bills of One Hundred Thirty-four and 98/100 (\$134.98) Dollars incurred by claimant, do not appear to have been paid, but claimant's full salary was paid to him during the period of his temporary total disability, at the rate of Ninety (\$90.00) Dollars per month.

The statement indicates that claimant was employed within the terms of the Workmen's Compensation Act; that the injury sustained arose out of and in the course of his employment, and that same is a compensable claim within the meaning of the Act. The required notices were given and application for payment was apparently made within a year as required by statute.

From the statement submitted, claimant is apparently entitled to an award for a ten (10) per cent permanent partial disability of his right arm.

Section 8, Par. 13 of the Workmen's Compensation Act of Illinois provides:

"For the loss of an arm or the permanent and complete loss of its use fifty per cent of the average weekly wage during two hundred twenty-five weeks."

Section 8, Par. 17 of said Act provides:

"For the permanent partial loss of use * * * fifty per centum of the average weekly wage during that portion of the number of weeks in the foregoing schedule provided for the loss of such member which the partial loss of use thereof bears to the total loss of use thereof."

Claimant's average weekly wage was Twenty and 76/100 (\$20.76) Dollars. On such basis he would be entitled to ten (10) per cent total disability in the sum of Two Hundred Thirty-three and 55/100 (\$233.55) Dollars. Added thereto, would be the sum of One Hundred Thirty-four and 98/100 (\$134.98) Dollars for medical, hospital and surgical bills incurred by claimant in the legitimate care of his injury, making a total of Three Hundred Sixty-eight and 53/100 (\$368.53) Dollars to which claimant would apparently be entitled. An

award would not apparently be justified for the sum of Four Hundred Seventy-two and 48/100 (\$472.48) Dollars which the statement indicates claimant has offered to accept in full settlement for his injury. Inasmuch as claimant received his full wages during the time of his total temporary disability, the difference between the fifty (50) per cent thereof which he was entitled to receive, subject to the maximum provided by the Workmen's Compensation Act, and the amount which he did receive would be a proper deductible item from the amount of such settlement. As the facts are also incomplete as to his marriage status, we leave the computation of such deduction to be made by the Illinois Emergency Relief Commission.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 27.

Settlement of claim for \$850.00 justified and found advisable.

FRANCES ALLEN, Claimant, vs. ILLINOIS EMERGENCY RELIEF
COMMISSION, Respondent.

Opinion filed October 12, 1937.

STATEMENT OF FACTS.

Frances Allen, 2256 Fifth Avenue, Fort Worth, Texas, claims to have sustained injuries on the 12th day of May, A. D. 1934, to the right side of her nose, cheek and neck and to her right forearm and middle finger of her right hand as a result of an attack by one Andrew Guerriero, a relief recipient, at the Stanford Park relief office, 1701 String Street, Chicago, Illinois.

The Illinois Emergency Relief Commission was created by an Act of the General Assembly of the State of Illinois effective February 6, 1932. The duties of the Illinois Emergency Relief Commission under this said Act at the time of claimant's alleged injuries were specified to be as follows:

"Powers and duties. It shall be the duty of the commission until March 1, 1937, to provide relief to residents of the State of Illinois, who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any other means deemed desirable by the commission. For the purpose of carrying out the provisions of this Act, the commission may make use of and cooperate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission has created many departments within itself since its creation through which relief is administered; such as maintenance department, furniture shops, mattress factories, canneries, work relief divisions and other divisions or departments too numerous to mention. Said maintenance department has charge of maintenance work in all buildings operated by the Illinois Emergency Relief Commission. Said work includes plumbing, carpentry, janitor work, engineering, and general repair work. Said furniture shops manufacture furniture which is used in relief offices throughout the State. Said mattress factories manufacture mattresses for relief recipients and for shelters operated by the Illinois Emergency Relief Commission. Said canneries preserve vegetables and fruits which have been grown by relief recipients on Illinois Emergency Relief Commission soil. Said work relief divisions furnish men to the State Highway Department, counties, townships, cities and parks for general maintenance work. All of the above enterprises or projects use sharp-edged cutting tools such as saws, chisels, mattocks and axes. Said buildings operate electric motors, elevators and boilers, all of which are governed by municipal ordinances.

Records of the Illinois Emergency Relief Commission show that from September, 1933, to and inclusive of September, 1936, there have been 344 disorderly conduct and assault and battery cases involving caseworkers in the employment of the Illinois Emergency Relief Commission. Said assaults were perpetrated by relief recipients while investigators were trying to investigate whether or not these individuals were eligible for relief. Of the above number, 328 were prosecuted in the Criminal Courts throughout the State. Of said number, 215 were found guilty of the charges heretofore alleged and 35 of said number were found not guilty; 43 of said number were dismissed and 31 of said number were dismissed for want of prosecution; 3 of said number were discharged and then sent to psychopathic hospitals, and one individual was committed directly to a psychopathic hospital.

Claimant was employed as a caseworker by the Illinois Emergency Relief Commission at the Stanford Park relief office, 1701 String Street, Chicago, Illinois. The duties of a caseworker are to contact families in the relief office and in

their homes and investigate their needs as to health, employment and the use of work relief money.

Claimant arrived at said relief office at approximately 8:50 A. M. on the day heretofore mentioned. She held the door for another worker to pass and then entered the building. Andrew Guerriero approached claimant from the rear and struck her with a razor across her neck, causing a deep laceration of the back of the neck eight inches long, penetrating the muscles down to the bone; a severe laceration of the nose, piercing through the nostrils, the septum of the nose and laying the nose almost backward up on the forehead; a laceration of the right cheek about three and a half inches long running transversely across the level of the angle of the mouth; a deep laceration of the flexor aspect of the right forearm about two and a half inches in length running transversely about four inches above the wrist; longitudinal laceration of the ring finger of the right hand almost splitting the skin of the finger along the mid line of its entire length. Immediately after the assault, claimant was removed to the Presbyterian Hospital, Chicago, Illinois, where she was under the care of Dr. Edwin M. Miller, an outstanding surgeon, and Dr. Frederick B. Moorehead, an outstanding plastic surgeon of Chicago. See Exhibit 1. Claimant was under the care of the above mentioned doctors for eight months.

Immediately after the attack, Andrew Guerriero ran from the relief office into the street where he was pursued by many relief clients who were in the office. He was finally apprehended by the police in a saloon a short distance from the relief office. When he was searched by the police, it was found that he carried a rusty razor having many nicks, and an ice pick. Andrew Guerriero was brought to trial in the Criminal Court of Cook County, Illinois, and found guilty of assault with intent to kill and sentenced from one to fourteen years in the penitentiary.

Claimant's salary at the time of the assault was One Hundred Forty Dollars (\$140.00) per month. The records of the Payroll Department of the Illinois Emergency Relief Commission show that she received full salary from May 1, 1934, to and inclusive of February 9, 1935.

Dr. Edwin M. Miller and Dr. Frederick B. Moorehead submitted a bill to the Illinois Emergency Relief Commission in the sum of Three Hundred Fifty Dollars (\$350.00) for

professional services rendered claimant. Said bill was paid on or about June 30, 1934. See Exhibit II.

The Presbyterian Hospital submitted bills to the Illinois Emergency Relief Commission in the amount of Two Hundred Two Dollars and Eighty-five Cents (\$202.85). Said bills were paid by the Illinois Emergency Relief Commission. Said amount included hospital care, X-rays and dressings. All medical and hospital expenditures have been investigated and found to be reasonable.

Claimant was under the care of Dr. E. P. Hall, Fort Worth, Texas, from February 22, 1935, to May 31, 1937. Dr. Hall has rendered Frances Allen a bill for professional services in the sum of One Hundred Dollars (\$100.00). Said bill was paid by Frances Allen on or about the 31st day of May, 1937. See Exhibit III.

Claimant was asked by the Illinois Emergency Relief Commission to have photographs taken of her face, neck and right arm. Said photographs were taken by Dr. Tom B. Bond at Fort Worth, Texas, on or about the 19th day of September, 1935. Claimant's pictures were taken before Arbitrators Anton Johannsen and Joseph L. Lisack of the Industrial Commission of the State of Illinois, 205 West Wacker Drive, Chicago, Illinois, on or about the 8th day of July, 1937. At that time, Arbitrators Johannsen and Lisack stated that they were of the opinion that claimant had permanent scars on her neck, chin and cheek and that under the rules and regulations of the Industrial Commission, a person in claimant's walk of life would be entitled to Two Hundred Fifty Dollars (\$250.00) as a result of said scars.

Frances Allen claims a twenty (20) per cent permanent and complete loss of the use of her right arm. Claimant is not asking for temporary total disability as she received her full salary during her period of disability.

Claimant's assault was witnessed by Miss Katherine Stuart, a co-worker at the Stanford Park relief office. See Exhibit IV.

Claimant's accident was in the course of, and arose out of, her employment. Further, the Illinois Emergency Relief Commission had notice of the accident and demand for compensation was made on her employer within six months after the accident.

In the course of claimant's work, electrically driven motors were operating in said relief office. There was also steam boilers operating in the basement of said building.

At the time of the accident, claimant was unmarried.

Section 3, paragraph 8, of the Workmen's Compensation Act of the State of Illinois provides:

"In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra hazardous * * *

Section 8, paragraph (a), of the Workmen's Compensation Act of the State of Illinois provides:

"The employer shall provide the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury * * *

Section 8, paragraph (c), of the Workmen's Compensation Act of the State of Illinois provides:

"For any serious and permanent disfigurement to the hand, head, face or neck, the employee shall be entitled to compensation for such disfigurement, the amount fixed by agreement or by arbitration in accordance with the provisions of this Act, which amount shall not exceed one-quarter of the amount of the compensation which would have been payable as a death benefit under paragraph (a), section 7, if the employee had died as a result of the injury at the time thereof, leaving heirs surviving, as provided in said paragraph (a), section 7: Provided, that no compensation shall be payable under this paragraph where compensation is payable under paragraph (d), (e) or (f) of this section: And, provided, further, that when the disfigurement is to the hand, head, face or neck, as a result of any injury for which injury compensation is not payable under paragraph (d), (e) or (f) of this section, compensation for such disfigurement may be had under this paragraph."

Section 8, paragraph 13, of the Workmen's Compensation Act of the State of Illinois provides:

"For the loss of an arm, or the permanent and complete loss of its use, fifty percentum of the average weekly wage during two hundred and twenty-five weeks."

Claimant has filed a petition in the Court of Claims which is known as *Frances Allen vs. State of Illinois*, No. 2667. A stipulation to dismiss said cause has been filed in the Court of Claims and claimant and her attorney have agreed to accept Eight Hundred Fifty Dollars (\$850.00) in full settlement of her injuries. One Hundred Dollars (\$100.00) of this amount is for medical expenses paid by claimant. A release

and waiver for Eight Hundred Fifty Dollars (\$850.00) has been secured by the Illinois Emergency Relief Commission.

COPY.

EDWIN M. MILLER, M. D.

Presbyterian Hosp.

June 22, 1934.

Mrs. Lucille Smith
Medical Relief Service
Illinois Emergency Relief Commission
1319 South Michigan Avenue
Chicago, Illinois

DEAR MRS. SMITH: Miss Frances Allen was brought to the Presbyterian Hospital on my service on the morning of May 12, 1934 a short time after having received severe lacerations by a razor while employed as a social worker for the Illinois Emergency Relief. She had lost a great deal of blood, was very pale and in considerable shock.

Her injuries consisted of a deep laceration of the back of the neck eight inches long, penetrating the muscles down to the bone; a severe laceration of the nose, piercing through the nostrils, the septum of the nose and laying the nose almost backward up on the forehead; a laceration of the right cheek about three and a half inches long running transversely across the level of the angle of the mouth; a deep laceration of the flexor aspect of the right fore arm about two and a half inches in length running transversely about four inches above the wrist; a longitudinal laceration of the ring finger of the right hand almost splitting the skin of the finger along the mid line of its entire length.

Owing to the poor condition of the patient a direct blood transfusion was given as quickly as possible after which under local anesthesia plastic operations were carried out on the wounds described above. The laceration through the nose was taken care of by Dr. Frederick B. Moorhead, the remainder of the work was done by myself. She was given 1500 units of antitetanic serum. She remained in the hospital a period of nineteen days, being discharged May 31, 1934.

All of her wounds healed by primary union except the one on the fore arm which became infected and healed slowly by granulation. After leaving the hospital she was seen by me at my office once each week. The last time was June 19, 1934 at which time her general condition was very good, all of her wounds had healed very satisfactorily except the wound of the fore arm which was still draining slightly. She had recovered apparently completely from her nervous shock and her morale was exceedingly good.

I am enclosing herewith the bill for the surgical services rendered Miss Allen by Dr. Moorhead and myself.

Sincerely yours,

EDWIN M. MILLER, M. D. (signed)

Exhibit I.

COPY.

EDWIN M. MILLER, M. D.
700 North Michigan Avenue
Chicago

June 22, 1937.

Illinois Emergency Relief Commission
319 South Michigan Ave.
Chicago, Illinois

For Professional Services
To Miss Frances Allen

| | |
|--------------------------------|-----------|
| Dr. E. M. Miller..... | \$ 250.00 |
| Dr. Frederick B. Moorhead..... | 100.00 |

| | |
|-------------|-----------|
| Total | \$ 350.00 |
|-------------|-----------|

Exhibit II.

COPY.

E. P. Hall, M. D.

E. P. Hall, Jr., M. D.

DRS. HALL & HALL
415 Medical Arts Building.
Fort Worth, Texas

July 14, 1937.

Illinois Emergency Relief Commission,
2126 S. Dearborn St.,
Chicago, Ill.

Re: Frances Allen

DEAR SIR: Your request for an itemized statement of services rendered Frances Allen from February 20, 1935 to October 5, 1935 received several days ago and due to illness and death in my family have been delayed in complying with your request for which I am very sorry, but it was unavoidable.

I did not do a great deal of treating to Miss Frances Allen, but on account of her badly disturbed mental condition did see her quite often and still see her every three or four weeks when she comes over from Dallas, where she is now employed.

First visit to Miss Frances Allen was February 20, 1935, she was very nervous, apprehensive, very restless, complained of pain and numbness in back of head in region of a large six inch scar, numbness in right lower forearm and wrist. The history was that while employed in relief work on May 12, 1934, in Chicago, Illinois, she was cut about the nose, face and almost around her head, beginning below her left ear, on the right arm near wrist and right finger by a relief client. That she was real sick and under treatment in Chicago, Illinois, for quite some time, that several weeks after her injury a piece of razor blade was removed from right arm and the wound was slow in healing, she stated that she went back to work and worked until she saw two other persons shot by a relief client and she completely gave way nervously.

Physical examination:

A rather pale, white female, age 26, single, a disfiguring scar across her nose and right side of chin and a six inch scar beginning below left ear and extending around the back of her head toward the right side. Large adhered scar on outer border of lower right forearm near wrist, supination and pronation of wrist is interfered with due to the adhesions. Also long scar on right middle finger. Eyes and ears seem normal, mouth, gums and throat are red and injected, tongue is coated in center.

Chest is conical in shape, expansion seems equal though respiration is sighing and irregular. Heart is normal in size, shape and position, rapid 96, weak tone and mild systolic murmur at apex.

Abdomen distended, not especially tender. Reflexes: eyes react to light and distance, knee reflexes exaggerated, no adnopathy.

At 10:00 A. M. 2/20/35 temperature 99.4, pulse 96, respiration 21. Blood pressure 95/65. Urinalysis essentially negative. Blood count: Hemoglobin 80%, red blood cells 3,500,000, white blood cells 10,800, differential: eosin 2, staff 6, segmented 60, lymphocytes 28, monocytes 4.

Exhibit III.**Diagnosis:**

Severe shock to nervous system from being attacked and severely wounded and seeing co-workers shot while in discharge of duty, mild anemia.

Treatment:

Complete rest, no visitors, generous balanced diet, amythal grains one and half p.r.n. for rest and quiet. February 21, 1935 at 5:00 P. M. temperature 99.6, pulse 90, respiration 20, rested only at intervals, has headache and dizzy when she raises up. Continued amytal, milk of magnesia one ounce in early A. M. 2/22/35.

2/23/35 at 9:00 A. M. temperature 99, pulse 88, respiration 20, appetite poor, slept poorly, bowels open, cries a great deal, says someone is trying to harm her, amytal continued for rest and quiet, tried to reassure patient that she was entirely safe.

2/25/35 5:00 P. M. temperature 99.6, pulse 95, respiration 22, rested only at intervals, very little improvement in mental condition, no change in treatment.

2/27/35 at 8:30 A. M. temperature 98.4, pulse 80, respiration 18, rested some better, still cries, is apprehensive of some danger. Same treatment.

3/1/35 at 4:00 P. M. temperature 99.2, pulse 90, respiration 20, very little change in patient's condition, same treatment carried out.

3/3/35 no improvement in mental state, will not be reassured, still complains of pain in back of head, anxious about the complete use of right forearm and wrist, at 8:00 A. M. temperature 98.4, pulse 84, respiration 20, massage with oil of Wintergreen to neck and wrist, no other change in treatment.

3/5/35 at 6:00 P. M. temperature 99.2, pulse 80, respiration 18, improvement very slight if any, very restless at times, amytal grs. lss had to be given four times in last twenty-four hours, now more or less drowsy.

3/7/35 at 8:30 A. M. temperature 99, pulse 86, respiration 18, some brighter today though still has headache. No change in treatment.

3/9/35 at 5:00 P. M. temperature 99, pulse 86, respiration 20, more alert and interested in things about her, not eating well. Nembutal grs. lss to grs 111 p.r.n. for rest and sleep.

3/11/35 at 9:00 A. M. temperature 98.6, pulse 86, respiration 18, still has melancholy spells and complains of head, no change in treatment.

3/15/35 at 8:30 A. M. temperature 98.4, pulse 80, respiration 18, condition about same, some quieter if any difference, no change in treatment.

3/17/35 at 7:00 P. M. temperature 99.2, pulse 90, respiration 24, had a restless night and day, more moody, empirin comp. gr. v, every two or four hours for head pains.

3/19/35 at 8:00 A. M. temperature 98.6, pulse 86, respiration 20, rested some better, head seemed to be eased by Empirin Comp.

3/21/35 at 6:00 P. M. temperature 99, pulse 100, respiration 24, has a fear that she is again to be harmed, can not be reassured.

3/23/35 at 6:30 P. M. temperature 99, pulse 96, respiration 20, some quieter, rested better, taking more food, bowels open.

3/25/35 at 8:00 A. M. temperature 98.4, pulse 86, respiration 18, some brighter, rested more, eating better.

3/27/35 at 6:00 P. M. temperature 99, pulse 98, respiration 20, continues to improve in spirit, occasional crying spell, nembutal only at night.

3/29/35 at 6:00 P. M. temperature 98.8, pulse 90, respiration 20, gradually improving, no change in treatment.

3/31/35 at 8:00 A. M. temperature 98.6, pulse 85, respiration 18, occasional crying and despondent spells though seems to be improving.

4/2/35 at 6:30 P. M. temperature 98.8, pulse 90, respiration 20, feeling better, not so much nembutal, sitting up for short intervals.

4/5/35 at 6:30 P. M. temperature 98.8, pulse 96, respiration 20, up and about house, much improved physically though melancholy at times, blood pressure 105/70.

4/7/35 at 6:00 P. M. temperature 98.6, pulse 96, respiration 18, continues to improve physically, depressed at times, is up and about house, auto ride recommended.

4/13/35 at 9:30 A. M. at office temperature 98.6, pulse 100, respiration 20, has picked up since last seen. Has occasional bad nights, gets nervous on exertion, can not be out too long, more rest advised.

4/19/35 11:00 A. M. at office temperature 98.6, pulse 100, respiration 20, shows some improvement mentally, seemingly more composed. Is taking yeast (Meads) two tablets t. i. d., Blaids pills plain gra. X t. i. d.

4/25/35 10:00 A. M. at office temperature 98.6, pulse 90, respiration 20, more stable, still has tremor in hands, pains in back of head, anxious about her disfiguring scar and limited motion in right forearm and wrist.

5/4/35 at office 9:30 A. M. temperature 98.4, pulse 90, respiration 18, looks well except for facial expression which is anxious and worried. Has pains in head and restless at night at times.

5/11/35 at office 11:00 A. M. temperature 98.3, pulse 100, respiration 20, condition about the same as when last seen, complains of head, fearful and despondent at times.

5/25/35 10:30 A. M. at office temperature 98.6, pulse 96, respiration 24, a little more nervous, hands tremble and head is paining, taking yeast and iron, nembutal when too nervous and can not sleep.

6/8/35 3:30 P. M. at office temperature 98.6, pulse 90, respiration 20, more quiet, eating well, feels tired at night. Better except headache and fear that something will happen to her.

7/12/35 at office 3:00 P. M. temperature 98.6, pulse 90, respiration 20, general condition is good, still has pains and numbness in back of head in region of scar. Has nervous spells, some slight, most every day, apprehensive, takes nembutal or amytal as needed for quiet, also iron and yeast.

7/26/35 at office 3:30 P. M. temperature 98.6, pulse 90, respiration 20, more quieter than on last visit, eating well, tired at night, better except for headache and fear that something will happen to her.

8/10/35 at office 10:00 A. M. temperature 98.8, pulse 100, respiration 21, general appearance is good, little change in mental condition, not free from pain in head and wrist gives discomfort, has to take amytal grs. 1-3 most every day, sometimes two or three times.

8/24/35 at office 10:30 A. M. temperature 98.6, pulse 96, respiration 20, apprehensive and moody, complains often of pain in back of head. Blood pressure 110/70.

9/7/35 office 4:00 P. M. temperature 99, pulse 100, respiration 21, has been feeling rather depressed last ten or twelve days. Head pains most every day, requires Empirin Comp. gr. x two or three times a day.

9/21/35 office 11:00 A. M. temperature 98.6, pulse 98, respiration 22, feels some better, headache has not been quite so severe, resting better at night except for scary dreams. Has discontinued iron, though taking yeast.

10/5/35 office 10:00 A. M. temperature 98.6, pulse 90, respiration 20, has quite a bit of numbness and pain in back of head. Right hand pains and gets tired, takes amytal grs. $\frac{1}{4}$ to grs. 1ss when nervous and can't sleep.

11/3/35 10:00 A. M. office temperature 98.6, pulse 96, respiration 20, has pains in head, also numbness and some dizziness, despondent and depressed at times.

11/30/35 office 3:00 P. M. temperature 98.6, pulse 90, respiration 20, condition about same, no change in treatment.

12/22/35 office 10:00 A. M. temperature 98.6, pulse 98, respiration 20, pain and numbness in back of head, has been very pronounced the past week, also depressed at times.

1/19/36 office 11:00 A. M. temperature 98.6, pulse 90, respiration 20, has had a better time for past two weeks, though head constantly annoys her, seems to be more stable and not so apprehensive.

2/16/36 office 10:00 A. M. temperature 98.4, pulse 96, respiration 18, in good flesh color better, not so much tremor in hands, complains of numbness in back of head and dizziness at times.

3/1/36 office 10:30 A. M. temperature 98.4, pulse 100, respiration 21, there still seems to be some fear of being injured by another person, more stable to-day than for some time, more rest advised. Have seen Miss Frances Allen at more or less regular intervals since 3/1/36 up to date but have made no charge or records of them, she recently had a blood count which was normal except for slight increase in white cells and urinalysis which was negative, made by Terrells Laboratory, Medical Arts Bldg., Fort Worth, Texas, also seen recently by Dr. Wilmer L. Allison, Nervous and Mental Disease, Medical Arts Bldg., Fort Worth, Texas.

Miss Allen also had an X-ray of the head by Dr. Tom Bond, 815 Medical Arts Bldg., Fort Worth, Texas. The X-ray threw no light on the headache, which I believe is due to severing so many muscles and nerves in back of head.

Miss Allen's condition shows marked improvement over what it was when she came home about 2/20/35. I believe her nervous system will become more stable as time goes on, but am fearful that the numbness and some pain in the back of the head will be permanent, as of course the disfiguring scars of the face and the limited movement in right forearm and wrist.

2-20-35 to 4-7/35 Inclusive, twenty-four house visits @ \$3.00..... \$72.00
4-13-35 to 3-1/36 Inclusive, twenty office visits @ \$2.00..... 40.00

Total charge \$112.00

5/31/37 paid \$100.00, deducted \$12.00.

On 5/31/37 when the hundred dollars was paid I cancelled the balance charged to her account, as I said before, have made no charges since 3/1/36. House visit on 3/13/35 has been left out as an oversight.

This report is from my records.

Again asking your indulgence for the unavoidable delay.

Respectfully submitted,

E. P. HALL, M. D. (Signed)

Sworn to and subscribed before me this 14th day of July, 1937.

MAY WILLIAMSON, (Signed),

Notary Public, Tarrant Co., Texas.

(Seal)

COPY.

STATEMENT.

Miss Katherine Stuart, 37 Elm Street, states that on May 12, 1934, she was employed by the Unemployment Relief Service, Stanford Park District, as Acting Assistant Supervisor.

On date aforesaid, I entered the building at 1701 String Street, offices of the Stanford Park district. Following me was Miss Frances Allen also an employee. When I had walked a short distance past the entrance, I heard a scuffling noise. I turned around and in the corner of the entrance hallway I saw a man with both his hands on Miss Allen's neck. She was struggling to free herself from him. Miss Allen screamed and leaned forward with her head bent down. Immediately there was severe hemorrhaging at her neck.

(signed) KATHERINE STUART.

Exhibit IV.

ADVISORY OPINION BY MR. JUSTICE YANTIS.

To the Illinois Emergency Relief Commission:

Pursuant to your request for an Advisory Opinion, based upon the attached statement of facts submitted by you in the matter of the claim of *Frances Allen vs. Illinois Emergency Relief Commission*, the following Opinion is rendered, based upon the aforementioned statement:

We find that Frances Allen was employed by the Illinois Emergency Relief Commission as a case worker on the 12th day of May, A. D. 1934; that as she entered the Relief Offices at 1701 String Street, Chicago, Illinois, on the morning of that date, one Andrew Guerriero, a relief client of that Office, approached from the rear and struck her across the neck with a razor, causing a deep laceration eight inches long, penetrating the muscles down to the bone; another severe laceration across the face piercing through the nostrils, the septum of the nose, and laying the nose almost backward on the victim's forehead; another laceration on the right cheek about three and one-half inches long transverse across the level of the angle of the mouth. Another wound about two and one-half inches in length and about four inches above the wrist was inflicted across the right forearm, with cuts on the ring finger of the right hand. Claimant's assailant was speedily brought to trial in the Criminal Court of Cook County, was found guilty of assault with intent to kill and sentenced from one to fourteen years in the penitentiary.

Immediately after the assault the patient was removed to the Presbyterian Hospital and placed under the care of Dr. Edwin M. Miller, as surgeon, and Dr. Frederick B. Moorehead, a specialist in plastic surgery. It appears that the surgeons' bills and the hospital bill have been paid, in the sum of Five Hundred Fifty-two and 85/100 (\$552.85) Dollars. Subsequent to such treatment, claimant moved to Fort Worth, Texas, where she has been under the care of Dr. E. P. Hall, to whom she has heretofore paid the sum of One Hundred (\$100.00) Dollars. An Opinion by Arbitrators Johannsen and Lisack, of the Illinois Industrial Commission, appearing in the record indicates their view that the scars on claimant's neck, chin and cheek were permanent and that under the rules and practice of the Commission, a person in claimant's walk of life would be entitled to Two Hundred Fifty (\$250.00) Dollars as a result of such scars.

It further appears that the injury to claimant's arm has not fully healed and has left her with limited motion in the right forearm and wrist, according to the statements by Dr. Hall. That in addition to this, she suffers more or less continuous pain in the right hand and same tires easily.

From a consideration of the entire record we believe your Commission would be entirely justified in allowing claimant

reimbursement for the One Hundred (\$100.00) Dollars heretofore expended by her, for additional medical services in care necessitated by such accident. The description of the disfigurements to claimant's face and neck fully justify an award of Two Hundred Fifty (\$250.00) Dollars. While the record is somewhat meager as to the percentage of lost motion and use of claimant's right arm, such record indicates a partial permanent loss of use of such right arm at an estimated figure of fifteen (15) per cent.

We are therefore of the opinion that your Commission is fully justified and may properly make settlement with claimant for an adjustment of all her claims in connection with said accident, in the sum of Eight Hundred Fifty (\$850.00) Dollars, which sum it appears that claimant, on advice of Counsel, has offered to accept in full settlement of her injuries. Such settlement if made should be made payable out of any funds held by the Commission and allocated for such purpose, and should be conditional upon the dismissal of the claim now pending in this court under the title of *Frances Allen vs. State of Illinois*, C. of C., No. 2667.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 28.

Settlement of claim for \$800.00 justified and found advisable.

EDWIN E. DENMAN, Claimant, vs. ILLINOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed September 14, 1938.

STATEMENT OF FACTS.

Edwin E. Denman, of McHenry, Illinois, claims to have sustained injuries on the 6th day of August, A. D. 1934, to his head, back, chest, and abdomen while working as a laborer for the Illinois Emergency Relief Commission on Project No. S255-B16-41.

Said project was requested by C. F. Thompson, Acting Director, of the Department of Conservation, State of Illinois, for general repairs and alterations at the State Fish Hatchery, Spring Grove, Illinois, and was approved by A. R. Lord, Illinois Emergency Relief Commission State Administrator of Work Relief. Said project provided for work as follows:

"Grading on bank along south boundary; riprapping banks of large pond; and installation of 'bug lamps'." The total cost of said project was \$2,607.30. Of this amount, \$320.00 was furnished by the State Department of Conservation and the remainder was furnished by the Illinois Emergency Relief Commission. Said project was approved on May 31, 1934, and work was completed on December 13, 1934.

The Illinois Emergency Relief Commission was created by an Act of the General Assembly of the State of Illinois, effective February 6, 1932. Chapter 23, Section 464, of the Illinois State Bar Statutes, 1935, sets out the duties of said commission, which are as follows:

"Powers and duties. It shall be the duty of the commission until March 1, 1937, to provide relief to residents of the State of Illinois, who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any other means deemed desirable by the commission. For the purpose of carrying out the provisions of this Act, the commission may make use of and co-operate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission has created many departments within itself since its creation through which relief is administered; such as maintenance department, furniture shops, mattress factories, canneries, work relief divisions and other divisions or departments too numerous to mention. Said maintenance department has charge of maintenance work in all buildings operated by the Illinois Emergency Relief Commission. Said work includes plumbing, carpentry, janitor work, engineering, and general repair work. Said furniture shops manufacture furniture which is used in relief offices throughout the State. Said mattress factories manufacture mattresses for relief recipients and for shelters operated by the Illinois Emergency Relief Commission. Said canneries preserve vegetables and fruits which have been grown by relief recipients on Illinois Emergency Relief Commission soil. Said work relief divisions furnish men to the State highway department, counties, townships, cities and parks for general maintenance work. All of the above enterprises or projects use sharp-edged cutting tools such as saws, chisels, mattocks and axes. Said buildings operate electric motors, elevators and boilers, all of which are governed by municipal ordinances.

Claimant was assigned to work on said project on the 6th day of August, 1934. Claimant had been assigned to other projects similar to the one above mentioned. In fact, claimant had been working with the work relief division of the Illinois Emergency Relief Commission since April 11, 1934. Claimant's assignments were for seven days' work each month, eight hours per day, and the rate of pay was forty (40) cents per hour.

Claimant was directed by the Illinois Emergency Relief Commission, Woodstock office, to appear at the Northwestern Depot at McHenry, Illinois, on the 6th day of August, 1934, and from there to go by truck to the State Fish Hatchery at Spring Grove, Illinois. On the day heretofore mentioned, claimant, with several other men, left McHenry, Illinois, for the Fish Hatchery. The truck in which the men were riding was owned and operated by the Division of Highways, State of Illinois. As the truck proceeded north on Johnsborg Road toward Spring Grove, it traveled about thirty (30) miles per hour until it came within one hundred (100) feet of State Route 60. As it neared the intersection, the truck slowed down to about fifteen (15) or twenty (20) miles per hour but did not stop and proceeded to cross Route 60. At the intersection, the front side of the left rear wheel of the truck was struck by an automobile driven east along Route 60 by one George Steiner. The collision caused the truck to turn over so that the front end was lying in the ditch on the north side of the pavement of Route 60. The rear end which swung around in a half circle was in the ditch on the east side of Johnsborg Road. When the truck turned over, claimant was thrown into the ditch. He was taken to Dr. C. W. Klontz at McHenry, Illinois, and Dr. C. W. Klontz took claimant to St. Theresa's Hospital at Waukegan, Illinois, where claimant remained until September 1, 1934.

At the hospital, X-ray pictures were taken and claimant was placed on a fracture bed where he remained on his back for twelve (12) or thirteen (13) days. When he was moved from the fracture bed, he was placed in a hospital bed and stayed there until he left the hospital.

On or about November 1, 1934, more X-ray pictures were taken because claimant suffered intense pains in movement. Accompanying these pains were severe headaches. Dr. C. W. Klontz and Dr. Freeland of Waukegan, Illinois, stated that

at the time of the accident, the X-ray pictures showed a "fracture of transverse process of first lumbar, left shoulder shows separation of Acromio Clavicular ligament. Left elbow very sore, evidently was dislocated but replaced itself. X-ray was negative. Lumbar region showed deep contusions and patient is passing blood thru kidneys, evidently there is a kidney injury." See Exhibit I.

Claimant was asked to submit to another examination on June 23, 1937. Said examination was made by Dr. Emil Hauser, an outstanding orthopedic surgeon of Chicago, Illinois. At this examination, Dr. Emil Hauser found that there was no orthopedic treatment necessary to relieve the pains claimant complained of. Dr. Emil Hauser was of the opinion that claimant was exaggerating his symptoms. See Exhibit II.

Frank Sanders, an employee of the Department of Conservation, State of Illinois, the driver of the truck in which claimant was riding at the time of the accident, stated that he made a full stop before crossing Route 60 and that the cause of the accident was a corn field which obstructed his view to the west. Said statement contradicts the statement made by claimant. See Exhibit III.

Payment of medical bills and hospital bills has been made by the Illinois Emergency Relief Commission.

Claimant's accident was in the course of, and arose out of, his employment. Further, the Illinois Emergency Relief Commission had notice of the accident and demand for compensation was made on his employer within six months after the accident.

Section 3, Paragraph 8, of the Workmen's Compensation Act of the State of Illinois provides:

"In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra hazardous * * *

Section 8, paragraph (a) of the Workmen's Compensation Act of the State of Illinois provides:

"The employer shall provide the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury * * *

Section 8, paragraph (c), of the Workmen's Compensation Act of the State of Illinois provides:

"For injuries in the following schedule, the employee shall receive compensation for the period of temporary total incapacity for work resulting from such injury, in accordance with the provisions of paragraphs (a) and (b) of this section, for a period not to exceed sixty-four weeks, and shall receive in addition thereto compensation for a further period subject to limitations as to amounts as in this section provided, for the specific loss herein mentioned, as follows, but shall not receive any compensation for such injuries under any other provisions of this Act."

Edwin E. Denman claims that from 1918 to 1933 he worked as a laborer on farms and that his rate of pay depended upon the crops produced on the farm he was operating, that the percentage for the year amounted to approximately Twenty-five Dollars (\$25.00) per month and shelter.

Section 8, paragraph (d), of the Workmen's Compensation Act of the State of Illinois provides:

"If, after the injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall, except in the cases covered by the specific schedule set forth in paragraph (e) of this section, receive compensation, subject to the limitations as to time and maximum amounts fixed in paragraphs (b) and (h) of this section, equal to fifty percentum of the difference between the average amount which he earned before the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident."

Dr. C. W. Klontz stated on September 22, 1937, that he was of the opinion claimant has a ten (10) per cent permanent and complete loss of the use of his back.

At the time of the accident, claimant was forty-two (42) years of age, lived with his wife and three children, all of whom were under sixteen (16) years of age.

Claimant filed a petition in the Court of Claims which is known as *Edwin E. Denman vs. State of Illinois*, No. 2691. Said claim is now pending before the court. A release and waiver has been secured by the Illinois Emergency Relief Commission and a stipulation to dismiss the above-entitled cause has been filed with the Court of Claims. Claimant and his attorney have agreed to accept Eight Hundred Dollars (\$800.00) in full settlement of his injuries.

COPY.

ILLINOIS EMERGENCY RELIEF COMMISSION.
SURGEON'S REPORT.

How many children under 16 yrs. of age - 3

Name of Injured Person—Denman, Edwin.

Age—40; Married or Single—Married.

Residence—McHenry, Illinois.

Local Governmental Unit.....Proj. No.....

At whose request did you take charge of case?—Thos. McCafferty.

Date of your first examination—August 6, 1934; Where—Office.

Injuries consist of—X-Ray shows fracture of transverse process of first lumbar, left shoulder shows separation of Acromio Clavicular ligament. Left elbow very sore, evidently was dislocated but replaced itself. X-ray was negative. Lumbar region showed deep contusions and patient is passing blood thru kidneys, evidently there is a kidney injury. An intravenous urogram was ordered but at present have no report.

When, where and by what means in your opinion were those injuries sustained?—State truck being turned over due to collision with passenger car while crossing highway south of Spring Grove, Ill.

Have you observed any physical impairment not the results of the above injuries?—No.

Explain fully surgical procedure up to and including this date—Left shoulder immobilized, patient placed prone on a fracture bed. Opiates to relieve pains which were very severe.

To what date do you deem further treatment necessary? Describe character and frequency—Cannot say at present.

How many days should injured lose from date of accident before he can resume his regular work?—Probably several months.

Has injured returned to work?—No.

In your opinion will the injuries result in death, loss of limb, sight, or any impairment of function? Explain fully.—Too early to give an answer.

Date of this report—August 9, 1934.

Signed—C. W. Klontz, M. D.; Address—McHenry, Ill.; Phone—181.

Exhibit I.

COPY.

DR. EMIL HAUSER
8 South Michigan Avenue
Chicago

June 28, 1937.

Illinois Emergency Relief Commission
1319 South Michigan Avenue
Chicago, Illinois.

Re: MR. EDWIN E. DENMAN

DEAR SIR:

Injured—Edward E. Denman, McHenry, Illinois.

History--On August 6, 1934, Mr. Denman sustained an injury to the back. He was said to have a fracture involving the spine. As far as this could be determined, it was of a transverse process. He also had pain over the left lumbar area, and this pain had persisted. He gave a history of having had urine in the blood at that time. He has continued to complain of pain in this area ever since.

Present Complaint--On June 23, 1937 he came to my office for examination, complaining of pain in the left lumbar area.

Examination--Physical findings were essentially negative, except for tenderness over the left lumbar area in the region lateral to the upper lumbar vertebrae, and below the chest cavity. Pressure over the ribs as well as over the vertebrae themselves did not give rise to any symptoms. The motion in the spine was good; it was free and apparently without pain. The reflexes were normal.

Treatment--Advised that a thorough urinary study be made of the kidney on the side of the complaint, if this has not already been done. I feel there is no orthopedic treatment necessary to relieve the symptoms of which he is complaining. The back was strapped as a test to obtain the reaction of the patient. The patient's response to simple tests suggested the idea that there was an exaggeration of the symptoms.

Conclusions--The old fracture of the transverse process, as seen in the X-ray, in my opinion could not account for the symptoms of which the man is complaining at the present time.

(Signed) EMIL HAUSER.

EH:ah

Exhibit II.

COPY.

Report of an accident involving Illinois Emergency Relief men on August 6, 1934 near Spring Grove.

The following is the statement of Frank Sanders:

I am regularly in the employ of the Department of Conservation of the State of Illinois, and drive the Department truck for the Fish Hatchery in Spring Grove. According to instructions on the morning at August 6th I drove to McHenry and picked up five relief workers to transport them to work at the hatchery. I was going north on the Johnsburg-Spring Grove road, and upon arriving at the intersection with Illinois Route No. 60 I came to a full stop within about twenty feet of the pavement. The approach from the west was somewhat obscured by a cornfield. At each corner of the intersection is a concrete culvert.

Upon looking in both directions, and observing that the road was clear, I started the truck in second gear. Upon arriving a little past the center of the road, I glanced to the left, and observed a car headed directly for us. The collision occurred almost immediately, and my truck was thrown off of the road to the right facing west, and tipped over. The man driving the Buick automobile later gave me his name as Stienér, Chicago. Another truck filled with ice stopped, when observing the collision, and took me to Spring Grove where I notified Mr. McCafferty, Supt. of the Fish Hatchery. He immediately returned to the scene of the accident, and took the injured relief workers to a doctor.

Upon checking the tire marks of both the truck and of the automobile, I found that the rear wheels of the truck were approximately three feet north of the center line of the highway when we were struck. There were no marks on the pavement showing that brakes had been applied by Mr. Stlener before striking us.

It is difficult to estimate the speed at which Stlener was traveling but I am sure that it was a high rate, and the driver of the ice truck whom Mr. Stlener had passed shortly before told me that the automobile that struck us was traveling at an excessively high rate of speed.

(Signed) FRANK SANDERS.

Exhibit III.

SUPPLEMENTAL STATEMENT OF FACTS.

In the Supplemental Statement of Facts, the Illinois Emergency Relief Commission wishes to show claimant's total temporary incapacity.

Statement of Facts which were submitted to the Honorable Court of Claim on or about the 1st day of November, 1937, alleges that claimant sustained an accidental injury on or about the 6th day of August, 1934, and that as a result of the injury, claimant was compelled to remain in the St. Theresa's Hospital, Waukegan, Illinois, until the 1st day of September, 1934, Dr. C. W. Klontz, McHenry, Illinois, attending physician, informed the Illinois Emergency Relief Commission by telephone on the 8th day of August, 1938, that his records showed that from the date of the accident until the 15th day of November, 1935, the claimant was temporarily totally incapacitated; that during the alleged period of incapacity, claimant was seen by Dr. Klontz on an average of twice a week. Dr. Klontz further informed the Illinois Emergency Relief Commission that he applied infra-red lamp treatment to the claimant's back for about one hour on each visit, and then strapped the back with adhesive tape. It was necessary to remove the adhesive tape every three or four days to avoid skin irritation. Dr. Klontz further stated that on or about the 15th day of October, 1935, he asked the claimant to do a few chores around his home; such as spading around the shrubbery. Claimant had only worked a few minutes when he came into the office complaining of dizziness and pain in the lumbar region of the back. Dr. Klontz further informed the Illinois Emergency Relief Commission that at this date the claimant is doing light work for the Works Progress Administration in McHenry County. The doctor is of the opinion

that claimant is able to do any kind of labouring work that is assigned to him at this time.

ADVISORY OPINION BY MR. JUSTICE YANTIS.

To the Illinois Emergency Relief Commission:

Pursuant to your request for an Advisory Opinion, based upon the statement of facts submitted by you in the matter of the claim of *Edwin E. Denman vs. Illinois Emergency Relief Commission* (No. 28), the court finds:

That on August 6, 1934 Edwin E. Denman of McHenry, Illinois, was assigned to work on Project No. S255-B16-41 for general repairs and alterations at the State Fish Hatchery at Spring Grove, Illinois. On the day stated claimant with other workmen was riding in a truck owned and operated by the Division of Highways of the State of Illinois, enroute from McHenry to the State Fish Hatchery at Spring Grove. As the truck neared the intersection with State Route No. 60 and the Johnsburg Road, it slowed down but did not stop. The front side of the left rear wheel was struck by an automobile that was traveling eastward on Route No. 60, driven by one George Stiener. The truck was turned over and the rear end swung around in a half circle in the ditch on the east side of the Johnsburg Road. Claimant was thrown into the ditch and sustained "a fracture of the transverse process of first lumbar, with left shoulder showing separation of Acromio Clavicular ligament; left elbow dislocated, lumbar region showing deep contusions and causing kidney injury resulting in passing of blood." Various X-ray pictures were taken. Claimant was put on a fracture bed in the Hospital at Waukegan and was examined by Dr. Emil Hauser, Orthopedic Surgeon of Chicago.

From a supplemental statement filed herein, it further appears that Dr. C. W. Klontz, of Waukegan, who attended claimant during his convalescence, treated the patient on an average of twice a week from the date of the injury, that the latter was compelled to remain in the Hospital until the 1st day of September, 1934, and that he was temporarily and totally incapacitated from the date of the accident until the 15th day of November, 1935.

It further appears from the statement submitted that claimant was forty-two years of age and lived with his wife

and three children, all of whom were under sixteen years of age at the time of the accident in question; further, that claimant has heretofore filed a claim in this court entitled, *Edwin E. Denman vs. State of Illinois*, Court of Claims, No. 2691; further, that he and his attorney have entered into a stipulation with your Commission that they will dismiss said claim upon a settlement by your Commission with him, in the sum of Eight Hundred (\$800.00) Dollars in full satisfaction of all rights and demands which he might have growing out of said accident.

The court is of the opinion and we find that at the time of the accident in question, claimant and his employer were operating under and bound by the provisions of the Workmen's Compensation Act; that said accident arose out of and in the course of such employment; that the period of temporary total incapacity as shown by the statement submitted was in excess of sixty-four (64) weeks, and that claimant would be entitled to not less than the said sum of Eight Hundred (\$800.00) Dollars, in satisfaction of temporary total disability under the provisions of section 8 of the Workmen's Compensation Act of Illinois.

We therefore find that the proposed settlement may properly be made with the claimant. We are further of the opinion that such claim should be subject to the following provisions, to-wit:

First: That the claim of *Edwin E. Denman vs. State of Illinois*, Court of Claims, No. 2691, now pending in the Court of Claims should be dismissed.

Second: That payment of the above compensation shall be made by the Illinois Emergency Relief Commission out of any funds held by it and allocated for the payment of such claims.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 29.

Settlement of claim for \$390.00 justified and found advisable.

JOHN SCHEURING, Claimant vs. ILLINOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed December 14, 1937.

STATEMENT OF FACTS.

John Scheuring, Harvard, Illinois, claims to have sustained an injury to his left leg on the 1st day of May, A. D.

1935, while working as a laborer for the Illinois Emergency Relief Commission on Project No. S255-B2-121.

Said project was requested by the State of Illinois, Division of Highways for work on State maintained roads in McHenry County, Illinois, by R. T. Cash, District Engineer, Elgin, Illinois, and was approved by A. R. Lord, State Administrator of Work Relief, on October 31, 1934. Work on said project, consisting of planting, guying, wrapping, trimming and watering trees, cutting back and sodding steep backslopes, laying tile lines, and removing and erecting right of way fences, was begun on November 23, 1934, and was discontinued August 31, 1935. The total cost of said project was \$22,052.31. Of this amount \$12,277.65 was furnished by the Illinois Emergency Relief Commission.

The Illinois Emergency Relief Commission was created by an Act of the General Assembly of the State of Illinois, effective February 6, 1932. Chapter 23, Section 464, of the Illinois State Bar Statutes, 1935, sets out the duties of said commission, which are as follows:

"Powers and duties. It shall be the duty of the commission until March 1, 1937, to provide relief to residents of the State of Illinois, who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any other means deemed desirable by the commission. For the purpose of carrying out the provisions of this Act, the commission may make use of and co-operate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission has created many departments within itself since its creation through which relief is administered; such as maintenance department, furniture shops, mattress factories, canneries, work relief divisions and other divisions or departments too numerous to mention. Said maintenance department has charge of maintenance work in all buildings operated by the Illinois Emergency Relief Commission. Said work includes plumbing, carpentry, janitor work, engineering, and general repair work. Said furniture shops manufacture furniture which is used in relief offices throughout the State. Said mattress factories manufacture mattresses for relief recipients and for shelters operated by the Illinois Emergency Relief Commission. Said canneries preserve vegetables and fruits which have been grown by relief recipients on Illinois Emergency

Relief Commission soil. Said work relief divisions furnish men to the State highway department, counties, townships, cities and parks for general maintenance work. All of the above enterprises or projects use sharp-edged cutting tools such as saws, chisels, mattocks and axes. Said buildings operate electric motors, elevators and boilers, all of which are governed by municipal ordinances.

Claimant was assigned to work on said project on or about the 17th day of April, 1935, and continued to work on said project until the day of his accident. Claimant had been assigned to similar work relief projects previous to the one heretofore mentioned. In fact, claimant had been working on work relief projects for two (2) years prior to the date of his accident. At the time of the accident, claimant had been working approximately thirty-two (32) hours per week on said project and for his services received forty cents (40c) an hour. Claimant's total earnings per month were approximately Fifty-two Dollars (\$52.00).

On the day of the accident, claimant was instructed by Mr. Desman, employee of the State of Illinois, Division of Highways, to work in a gravel pit at Fox River Grove, Illinois. The work in the gravel pit consisted of shoveling gravel from the pit into trucks belonging to the Division of Highways. As claimant was in the process of shoveling gravel into a truck, a large rock about the size of a bushel basket, weighing approximately one hundred (100) pounds, became loose and rolled into the pit, pinning claimant against the truck. As a result, claimant suffered fractures of both bones in his left leg.

Dr. W. J. Copeland, of Cary, Illinois, was called immediately. Dr. Copeland arrived at the scene of the accident within a half hour and took claimant to the Harvard Community Hospital, Harvard, Illinois. See Exhibit I. On July 25, 1935, Dr. W. J. Copeland estimated that the time of claimant's total disability from the date of injury would be six (6) months and that thereafter there would be a permanent partial disability of approximately ten (10) per cent. See Exhibit II.

The records of the Harvard Community Hospital show that claimant was admitted on May 1, 1935; that claimant was carried into the hospital on a stretcher; that X-ray films were taken which showed fractures of both bones of his left

leg; that a plaster cast was applied and that claimant was placed in a fracture bed; that claimant remained in said hospital until August 9, 1935; and that at the time of his discharge, claimant walked on crutches.

At the time claimant was admitted to the hospital, Dr. W. J. Copeland asked Dr. C. J. Maxon of Harvard, Illinois, to assist him in this case. On March 24, 1937, Dr. C. J. Mason stated that X-ray pictures taken on May 1, 1936, showed perfect union, but because claimant was seventy (70) years old, there was not much possibility of his having more than seventy (70) per cent use of his leg and that there would always be some stiffness in his ankle and weakness in his leg.

Claimant's accident was witnessed by Helmeth C. Doeck, also employed on the work relief project, who was working in the gravel pit with claimant. On March 24, 1937, Helmeth C. Doeck stated that after claimant's accident, the Division of Highways discontinued employing laborers in the gravel pit because of the unsafe working conditions and thereafter used a steam shovel to remove gravel from the pit.

Claimant's accident was in the course of, and arose out of, his employment. In the course of claimant's employment, sharp-edged cutting tools, such as mattocks, saws, chisels, picks and shovels, were used.

Section 3 of the Workmen's Compensation Act of the State of Illinois provides:

"The provisions of this Act hereinafter following shall apply automatically and without election to the State, county, city, town, township, incorporated village or school district, body politic or municipal corporation, and to all employers and all their employees, engaged in any department of the following enterprises or businesses which are declared to be extra hazardous, namely: * * *

7½. Any enterprise in which sharp edged cutting tools, grinders or implements are used, including all enterprises which buy, sell or handle junk and salvage, demolish or reconstruct machinery, except as provided in subparagraph 8 of this section. * * *

The Illinois Emergency Relief Commission had notice of the accident and demand for compensation was made within six months after the accident.

Medical and hospital bills have been paid by the Illinois Emergency Relief Commission.

Section 8, paragraph (a), of the Workmen's Compensation Act of the State of Illinois provides:

"The employer shall provide the necessary first aid medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury. • • •"

Claimant and his wife have been receiving Old Age Assistance in the sum of Twenty-eight Dollars (\$28.00) per month since March 24, 1937. Claimant has had no employment since the day of the accident and claims he is unable to do manual labor because his left leg will not support his weight and stiffness in his ankle impairs his walk. Claimant's last employment previous to his work relief assignments was in 1931, when he was employed by one Robert M. Fritz, real estate dealer, as a laborer, cutting brush and repairing fences. For his services he received forty cents (40c) per hour. Claimant has done manual labor all during his life and his approximate wage was forty cents (40c) per hour, working approximately forty-eight (48) hours per week. At the time of the accident, claimant had no children under sixteen (16) years of age.

Section 8, paragraph (c), of the Workmen's Compensation Act of the State of Illinois provides:

"For injuries in the following schedule, the employes shall receive compensation for the period of temporary total incapacity for work resulting from such injury, in accordance with the provisions of paragraphs (a) and (b) of this section, for a period not to exceed sixty-four weeks, and shall receive in addition thereto compensation for a further period subject to limitations as to amounts as in this section provided, for the specific loss herein mentioned, as follows, but shall not receive any compensation for such injuries under any other provisions of this Act."

Section 8, paragraph (c), sub-paragraph 15, of the Workmen's Compensation Act of the State of Illinois provides:

"For the loss of a leg, or the permanent and complete loss of its use, fifty per centum of the average weekly wage during one hundred and ninety weeks."

Claimant and his attorney have agreed to accept Three Hundred Ninety Dollars (\$390.00) in full settlement for his injuries. Releases and waivers have been secured by the Illinois Emergency Relief Commission for this amount. No claim has been filed against the State of Illinois in the Court of Claims.

COPY.

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I. E. R. C.

PHYSICIAN'S REPORT.

Name of Injured Worker—Scheuring John
 (Last Name) (Middle Name) (First Name)
 Residence Address— Harvard, Ill. McHenry.
 (Street and Number) (City or Village) (County)
 Age—69; Sex—Male; Single—...; Married—Yes; No. of Children—1.
 Project No.—S255-B2-121; Employing Agency—State of Ill. Div. of Highways.
 At Whose Request Did You Take Care of This Case?—Gustave Hoglund.
 Date and Time of Your
 First Examination— Wed. May 1 1935 at 3:30 P. M.
 Day of Week Month Date Year Time
 Where Was the Examination Made?—At Fox River Grove, Highway No. 12.

Injuries consist of?—Fracture of both bones of left leg—the tibia at lower 1/3 and fibula at upper and lower 1/5's.

When, in your opinion, were these injuries sustained?—May 1, 1935.

By what means, in your opinion, were these injuries sustained?—Cave in of bank with large stone hitting leg.

Have you observed any physical impairment not the result of the above injuries? If so, what?—No.

Explain fully medical or surgical procedure or treatment up to and including this date.—Temporary wood splint—to Harvard Hospital—X-Ray setting—splinting in plaster case bivalved.

To what date do you deem further treatment necessary? Describe character and frequency—At least 2 mos.

How many days, in your opinion, should injured lose from date of accident before he can resume his regular work?—At least 3 mos.

In your opinion, will the injuries result in death, loss of limb, sight, or any impairment of function? Explain fully—May be some shortening of leg or stiffness of ankle.

Date of This Report—5/1/35.

Signed—W. J. Copeland, M. D.; Telephone—Gary No. 9.

Address— Gary, Ill. McHenry.
 (Street and Number) (City) (County)

Exhibit I.

COPY.

DR. WILLIAM J. COPELAND
 Physician and Surgeon
 Cary, Illinois

7/25/35

Ill. Emerg. Rel. Com.
 Chicago, Ill.

GENTLEMEN: This is to give you an estimate of the disability of John Scheuring, Harvard, Ill., injured 5/1/35.

I estimate that the time of total disability from the date of injury will be 6 months, and that thereafter there will be a permanent partial disability of approximately ten per cent.

Respectfully yours,

W. J. COPLAND, M. D.

Exhibit II.

ADVISORY OPINION BY MR. JUSTICE YANTIS.

To the Illinois Emergency Relief Commission:

Pursuant to your request for an Advisory Opinion, based upon the attached statement of facts submitted by you in the matter of the claim of *John Scheuring vs. Illinois Emergency Relief Commission*, the following Opinion is rendered, based upon the aforementioned statement:

Such statement discloses that Claimant John Scheuring had been employed by the Illinois Emergency Relief Commission for approximately two years prior to May 1, 1935, during which time he had worked on various Relief Projects, being employed approximately thirty-two hours per week, at Forty (40) Cents per hour, or a yearly total of Six Hundred Twenty-four (\$624.00) Dollars. On the date stated he was shoveling gravel from a pit at Fox River Grove, Illinois, into trucks belonging to the Division of Highways of Illinois, on road work in McHenry County on Project No. S255-B2-121. While so engaged a rock weighing approximately one hundred pounds rolled into the pit, pinning claimant against the truck and resulting in a fracture of both bones in his left leg. Immediate medical care was given, and claimant remained in the Harvard Community Hospital from the date of the accident until August 9, 1935. When discharged from the hospital he was still walking on crutches, and on March 24, 1937 Dr. C. J. Maxon who had assisted in caring for the patient at the time of the injury, stated that X-ray pictures taken on May 1, 1936, showed a perfect union of the broken bones, but that because claimant was seventy (70) years old, there was not much possibility of his having more than seventy (70) per cent use of his leg, and that a stiffness in the ankle and weakness in the leg would always exist.

The statement further shows that claimant has been unemployed since the accident, but that he and his wife had been

receiving Old Age Assistance from the State of Illinois, in the sum of Twenty-eight (\$28.00) Dollars per month since March 24, 1937, and that he had no children at the time of the accident who were then under the age of sixteen years.

It further appears that all medical and hospital bills have been paid by the State and that claimant, by and with the advice of his Attorney, has agreed to accept Three Hundred Ninety (\$390.00) Dollars in full settlement for the injuries sustained by him in the accident in question.

The statement sufficiently discloses:

That claimant sustained an injury while employed by the respondent;

That the injuries received are compensable under the terms of the Workmen's Compensation Act;

That the purported settlement of Three Hundred Ninety (\$390.00) Dollars is within the amount to which claimant would be entitled for temporary total disability and thirty (30) per cent specific loss of use of claimant's left leg; all as provided for under Sections 8 (b), 8 (e), 15 and 17 of the Illinois Workmen's Compensation Act.

We therefore find that such settlement by the I. E. R. C. with claimant is legally justified. While no claim has heretofore been filed by claimant in the Court of Claims, the release that will be obtained by the Commission in making the above settlement should be so drawn as to preclude the filing of any such claim hereafter.

ILLINOIS EMERGENCY RELIEF COMMISSION. No. 30.

Settlement of claim for \$3,000.00 justified and found advisable.

PEARL JENKINS, Claimant vs. ILLINOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed January 12, 1938.

STATEMENT OF FACTS.

Pearl Jenkins, Marion, Illinois, wife of Frank Jenkins, deceased, claims that on the 18th day of October, A. D. 1934, Frank Jenkins died as a result of injuries sustained on that day while he was employed as a trucker for the Williamson County Emergency Relief Committee, which was under the

direct supervision and control of the Illinois Emergency Relief Commission.

Frank Jenkins, deceased, on the date heretofore mentioned, was directed by George Morris, depot superintendent for the Williamson County Emergency Relief Committee, to report for work at the Goddard Building, which was used and occupied as a warehouse for surplus commodities for the Williamson County Emergency Relief Committee, at 9:00 A. M. On that date when Frank Jenkins, deceased, reported for work, the stakes on his truck were not up to specifications so George Morris instructed Frank Jenkins, deceased, to make changes in his truck or otherwise the work would be assigned to other employees. Frank Jenkins complied with this request and appeared at the building with the proper equipment. In the course of unloading his truck at the Goddard Building, John Jenkins, son of Frank Jenkins, who was assisting his father in the course of his work, got in the truck to move it and when he released the brakes, the truck rolled backward, crushing Frank Jenkins between the truck body and the wall of the building and injuring him so severely that he died twelve (12) hours later in the Herrin Hospital, Herrin, Illinois.

The accident involving Frank Jenkins, deceased, was witnessed by Tom Lewis, who was assisting in unloading some cans. The process of unloading same consisted of sliding boxes of cans over a board into the basement of the food depot. After all cans had been unloaded from the truck, the board was removed and George Morris had instructed Frank Jenkins, deceased, to go back to the box car and secure another load. As the truck was being operated by John Jenkins, the clutch was released and the truck rolled back into Frank Jenkins, deceased, pinning him between the wall of the building and the body of the truck. After the accident, Frank Jenkins, deceased, was taken to the Herrin Hospital.

George Morris testified on the 13th day of July, 1935, that during the month of October, 1934, he was food depot superintendent for the Illinois Emergency Relief Commission, which was located at 510 West Union Street in Marion, Illinois, and that his immediate superior was Frank Miller, Administrator for the Williamson County Emergency Relief Committee. Said building had three (3) floors and a basement and was approximately one hundred (100) feet long and about sixty (60) feet wide. He was in charge of the food depot during said

month and had been in charge for approximately eight (8) months prior to that time. Said building was used during that period for storing surplus commodities which were issued to relief recipients. Besides handling commodities for Williamson County, they also stored commodities for adjoining counties and said building was used as a warehouse for these surplus foods. Trucks were used in the distribution of said commodities. During the month of October, 1934, there were four (4) trucks operating from the food depot. George Morris' duties as depot superintendent in connection with the loading depot consisted of supervising the loading and unloading of surplus commodities; also the supervision of all men employed at the food depot. George Morris further testified that all truck drivers would report to him when requested to do so by him and that before any work was started he would inform the truck drivers what work should be done and when and how said work should be done. If there was more than one trucking job to be done at a time, the truckers would be informed by George Morris as to which job should be completed first. George Morris further testified that the rate of pay for trucking at the time of Frank Jenkins' death was Five Cents per hundred pounds in Marion and Ten Cents per hundred pounds outside of Marion. Truckers were also paid for moving relief recipients. The rate of pay was Five Dollars (\$5.00) or Ten Dollars (\$10.00), the amount depending on the size of the load. There were also occasions when Frank Jenkins and other truckers were employed on an hourly rate.

All medical and hospital bills in the sum of Thirty-One Dollars (\$31.00) have been assumed by Pearl Jenkins. Frank Jenkins' death was in the course of, and arose out of, his employment. The Illinois Emergency Relief Commission had notice of his death and demand for compensation was made by the claimant on his employer within six (6) months after his death.

Dr. H. A. Felts, Marion, Illinois, informed the Illinois Emergency Relief Commission that he was called to the Goddard Building on an emergency case on the date heretofore mentioned and that when he arrived, he found Frank Jenkins suffering from fractured left arm, collar bone and ribs, also internal injuries; that he immediately ordered Frank Jenkins to be taken to the Herrin Hospital, Herrin, Illinois, for treatment; that when the patient arrived at the hospital, he

was placed in bed because he was suffering from shock; that patient died that evening as a result of the accident; that the cause of death was internal injuries and fractured ribs which penetrated and punctured the left lung.

Pearl Jenkins claims that Frank Jenkins, deceased, earned between Two Hundred Dollars (\$200.00) and Three Hundred Dollars (\$300.00) a month from the Illinois Emergency Relief Commission as a trucker. That his average annual income from the State for this work was Three Thousand Five Hundred Dollars (\$3,500.00). Further, that one-half of the payment was for the use of the truck and that one-half was for the services of the driver. The records of the Illinois Emergency Relief Commission show that Frank Jenkins' annual earnings were approximately Three Thousand Five Hundred Dollars (\$3,500.00) a year.

Pearl Jenkins claims that prior to his employment with the Illinois Emergency Relief Commission, Frank Jenkins, deceased, was duly elected county recorder of Williamson County, Illinois. After term of office expired, he sold Hudson and Terraplane automobiles for L. A. Boyd and during his employment with the Illinois Emergency Relief Commission he hauled coal for different individuals throughout the city. The charge for hauling was Seventy-five Cents per ton.

Pearl Jenkins claims that Frank Jenkins, deceased, was her sole support and also was the sole support of Frank Weaver Jenkins, aged 13, and Billy Jean Jenkins, aged 8.

On May 11, 1937, the Illinois Court of Claims filed an Opinion denying an award for compensation on the ground that the facts shown in the record were just as pertinent to show that Frank Jenkins was an independent contractor as to prove that he was an employee, and therefore claimant had not sustained the burden of proving that Frank Jenkins was an employee of the respondent.

A petition for rehearing was filed by the claimant and on June 10, 1937, an order was entered in this court granting the petition and reopening the cause for further evidence. Additional evidence was heard on the 13th day of July, 1937. At this time the evidence showed conclusively that Frank Jenkins, deceased, was an employee of the Illinois Emergency Relief Commission.

Sharp-edged cutting tools such as saws, chisels and picks were used in the course of Frank Jenkins' employment. There

were also electrically driven motors operating in the warehouse.

Section 8, paragraph (a) of the Workmen's Compensation Act of the State of Illinois provides:

"The employer shall provide the necessary first aid medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury. * * *

Section 3 of the Workmen's Compensation Act of the State of Illinois provides:

"The provisions of this Act hereinafter following shall apply automatically and without election to the State, county, city, town, township, incorporated village or school district, body politic or municipal corporation, and to all employers and all their employees, engaged in any department of the following enterprises or businesses which are declared to be extra hazardous, namely: * * * 3. Carriage by land, water or aerial service and loading or unloading in connection therewith, including the distribution of any commodity by horse-drawn or motor driven vehicle where the employer employs more than two employees in the enterprise or business, except as provided in sub-paragraph 8 of this section. 4. The operation of any warehouse or general or terminal storehouses. * * *

Section 7, paragraph (a) of the Workmen's Compensation Act of the State of Illinois provides:

"If the employee leaves any widow, child or children whom he was under legal obligations to support at the time of his injury, a sum equal to four times the average annual earnings of the employee, but not less in any event than two thousand five hundred dollars and not more in any event than four thousand dollars * * *."

Section 7, paragraph (h), sub-paragraph 3 of the Workmen's Compensation Act of the State of Illinois provides:

"Whenever in paragraph (a) of this section a maximum of four thousand dollars is provided, such maximum shall be increased in the following cases to the following amounts:

Four thousand four hundred fifty dollars in case of one child under the age of sixteen years at the time of the death of the employee.

Four thousand eight hundred dollars in case of two children under the age of sixteen years at the time of the death of the employee. * * *

Claimant has agreed to dismiss the claim which is known as *Pearl Jenkins vs. State of Illinois*, No. 2541, which is now pending before the Court of Claims, and has signed releases and waivers for the Illinois Emergency Relief Commission and has agreed to accept Three Thousand Dollars (\$3,000.00) in full settlement of her claim.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

On November 20, 1934, claimants filed their claim against the State of Illinois under the Workmen's Compensation Act claiming the sum of Forty-eight Hundred Dollars (\$4,800.00) alleged to be due on account of the death of the husband and father, Frank Jenkins, which claim was known as No. 2541. Evidence was taken under this claim, briefs and arguments were filed by counsel for both sides, and thereafter, this court filed an opinion denying an award for compensation on the ground that the facts shown in the record were just as pertinent to show that Jenkins was an independent contractor as to prove that he was an employee, and for the reason that claimants did not show that Jenkins was an employee of the respondent, an award was denied.

A petition for rehearing was filed by claimants and on June 10, 1937, an order was entered in this court granting the petition and re-opening the case for further evidence.

On August 13, 1937, a transcript of this new evidence was filed in accordance with the rules of this court.

It appears from the evidence that on the 18th day of October, 1934, Frank Jenkins died as a result of injuries sustained on that day while he was employed as a trucker for the Williamson County Emergency Relief Committee, which was under the direct supervision and control of the Illinois Emergency Relief Commission.

During the year 1934, the State of Illinois, through one of its agencies, the Illinois Relief Commission, operated a central food depot located in the Goddard Building in the City of Marion, Williamson County, Illinois. This commission was dispensing food and other necessities of life to the poor of Williamson County. The prosecution of this work required the transportation of surplus food supplies from railroads to the central food depot in Marion,—their storage warehouse—and from there a distribution was had to the relief clients throughout the county. The central commodity deposit was a three story and basement brick building, approximately 60 feet wide by 100 feet long, and between 75 and 100 men worked at the warehouse at different times, and the record shows that in the handling of the storage and distribution of these surplus commodities, trucks were used. The Commission did not own the trucks, but hired at least

four men to carry out such trucking operations as were necessary. The deceased was one of those so employed. He furnished his own truck, receiving for the work done by him, checks averaging from \$200.00 to \$300.00 monthly from the State of Illinois. These checks were based upon the amount and kind of work he performed, payment for certain kinds of hauling being on a weight and mileage basis, payment for other kinds of hauling on a trip basis, while still other hauling was paid upon an hourly basis. Witnesses estimated his average annual income from the state for this work at \$3,500.00. The respondent offered no evidence in denial of the earnings of the deceased.

Under the prevailing rates, one-half of the payment was for the use of the truck, and one-half for the services of the driver.

On the morning of October 18, 1934, Frank Jenkins and other employees of the Illinois Emergency Relief Commission were unloading his truck at the central food depot. A son of Jenkins was also employed in this work and worked along with his father. He got upon the truck to move it, and when he released the brake, the truck rolled backward, crushing Frank Jenkins between the truck body and the wall of the building and injuring him so severely that he died twelve hours later.

The deceased was survived by Pearl Jenkins, his wife, the adult son, John, and the two minor sons, Frank Weaver Jenkins, age 13 and Billy Jean Jenkins, age 8.

The additional evidence heard was upon the question of the degree of control exercised by the Illinois Emergency Relief Commission over Jenkins' activities in the trucking done by him.

At the time Jenkins received his injury and for a considerable time prior thereto, this warehouse or food depot was in charge of a Depot Superintendent, George Morris. Morris testified that he was superintendent and boss over the truck, and that he told the drivers what they should do, and how they should do it and when they should do it, and this was true with reference to Frank Jenkins. Morris testified that he required the drivers to assist in loading and unloading the trucks at the food depot, and that the drivers did what he told them to do. There were various doors at the

food depot at which trucks could be loaded and unloaded, and drivers were required to load or unload at the particular door which Morris directed. When Jenkins' services were needed, Morris would notify him, usually the day before, and would advise him at what time he should report, and Jenkins would report at the appointed time. Occasionally several car loads were standing on side tracks, waiting to be unloaded, and Jenkins would unload these cars under the direction of Morris, and when commodities were loaded onto Jenkins' truck for distribution throughout the county, Morris directed how this work should be done, in detail as to each delivery, and he would take what really amounted to a receipt in triplicate for deliveries, and he was instructed that commodities for which orders were not signed must be returned to the food depot. Jenkins was not permitted to engage in hauling for others or obtaining private employment when he was making distribution of commodities. Distribution was made from Marion to smaller towns in that county, and in doing this, he was instructed as to the order in which distribution to these towns should be made, the time he should arrive at and how long he should remain in the various towns on the itinerary, and he followed these instructions.

On the morning of October 18, 1934, Jenkins reported for work with a low stake body on his truck. Morris objected and Jenkins returned home for longer stakes and placed them in position on his truck before proceeding on the job which resulted in his death.

It has been repeatedly held that where the person for whom service is rendered retains the right to control the details of the work and the method or manner of its performance, the relation of employer and employee exists. It has also been held that when the party for whom trucking is performed controls the loading and unloading of the truck, the destinations of the loads, the manner of handling the loads at such destinations, the kind and quantity of material hauled, the distances travelled by the truck, the amount of pay received for the loads, the hours of employment, the time at which various deliveries shall be made and various trucking operations performed, and the manner in which the truck shall be equipped, the trucker is an employee and not an independent contractor. *VanWatermullen vs. Ind. Com.*, 343 Ill. 73.

The fact that Jenkins owned his own truck is not inconsistent with an employee relationship, and the fact that he was paid for a part of his work on a weight and mileage basis does not make him an independent contractor.

Our Supreme Court has also held that in determining whether one is an employee, the Workmen's Compensation Act is to be liberally and broadly construed, and the State of Illinois, in distributing surplus commodities by motor driven vehicles, and employing four truck drivers and at least fifteen laborers in connection with such distribution, was operating under and subject to the Illinois Workmen's Compensation Act.

The accident was witnessed by Tom Lewis, who was assisting Jenkins. Jenkins was instructed by George Morris to go back to the box car and secure another load. It was when the truck was about to be started that Jenkins received the injury which caused his death.

All medicine and hospital bills in the sum of \$31.00 were assumed by Pearl Jenkins, wife of Frank Jenkins.

In view of the facts in this case, the court finds:

1. That the deceased and the respondent were on the 18th day of October, 1934, operating under the provisions of the Workmen's Compensation Act; that on the date last above mentioned, Frank Jenkins, the deceased, sustained accidental injuries which did arise out of, and in the course of his employment, resulting in the death of said deceased twelve hours later; that notice of said accident was given said respondent and claim for compensation on account thereof was made on said respondent within the time required under the provisions of the Workmen's Compensation Act.

2. That the deceased at the time of injury had two children under sixteen years of age.

3. That the necessary first aid had not been provided by the respondent herein.

4. That said deceased left him surviving as his sole beneficiaries under section seven, paragraph (a) of said Act, as amended, his widow, Pearl Jenkins, the petitioner, and two minor sons, Frank Weaver Jenkins, age 13 and Billy Jean Jenkins, age 8, all of whom were totally dependent upon the deceased.

5. That claimant has agreed to dismiss the claim which is known as *Pearl Jenkins, widow, et al. vs. State of Illinois*,

No. 2541, which is now pending before this court, and has signed releases and waivers for the Illinois Emergency Relief Commission, and has agreed to accept the sum of \$3,000.00 in full settlement of her claim, upon approval of this court, and the court finds that the Illinois Emergency Relief Commission has agreed to pay said Pearl Jenkins, the said sum of \$3,000.00.

Such amount is within the sum to which the said Pearl Jenkins and said minor children would be entitled under the terms of the Workmen's Compensation Act. Such settlement is therefore approved upon condition that said amount be paid in cash and that such portion thereof as would otherwise be paid to the minor children of said decedent shall be paid to their mother, Pearl Jenkins, for the support of said minors and upon the further condition that case No. 2541 now pending in this court shall be dismissed; such payment to be made out of funds allocated to the Illinois Emergency Relief Commission and now available for such payment.

Therefore, this court approves the settlement of this Cause known as No. 30 and directs the dismissal of cause known as No. 2541.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 31.

Settlement of claim proposed by claimant not advised.

CLARA E. BAILEY, Claimant *vs.* ILLINOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed December 20, 1938.

STATEMENT OF FACTS.

Clara R. Bailey, 722 South 4th Street, Greenville, Illinois, claims to have sustained an injury on the 30th day of November, 1934, to her back and left side while working as an accounting supervisor for the Bond County Emergency Relief Committee, 101 East Oak Street, Greenville, Illinois.

The duties of an accounting supervisor are to prepare financial statements for the Illinois Emergency Relief Commission showing disbursements which have been made by the local relief office; also to interview clients who have been assigned to work relief and to make reports to the Illinois

Emergency Relief Commission as to the progress made on work relief projects throughout the county.

The Illinois Emergency Relief Commission was created by an Act of the General Assembly of the State of Illinois, effective February 6, 1932. The duties of the Illinois Emergency Relief Commission under this said Act at the time of the claimant's alleged injury were specified to be as follows:

"Powers and duties. It shall be the duty of the commission until March 1, 1937, to provide relief to residents of the State of Illinois, who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any other manner deemed desirable by the commission. For the purpose of carrying out the provisions of this Act, the commission may make use of and co-operate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission has created many departments within itself since its creation through which relief is administered; such as maintenance department, furniture shops, mattress factories, canneries, work relief divisions and other divisions or departments too numerous to mention. Said maintenance department has charge of maintenance work in all buildings operated by the Illinois Emergency Relief Commission. Said work includes plumbing, carpentry, janitor work, engineering, and general repair work. Said furniture shops manufacture furniture which is used in relief offices throughout the State. Said mattress factories manufacture mattresses for relief recipients and for shelters operated by the Illinois Emergency Relief Commission. Said canneries preserve vegetables and fruits which have been grown by relief recipients on Illinois Emergency Relief Commission soil. Said work relief divisions furnish men to the State highway department, counties, townships, cities and parks for general maintenance work. All of the above enterprises or projects use sharp-edged cutting tools such as saws, chisels, mattocks and axes. Said buildings operate electric motors, elevators and boilers, all of which are governed by municipal ordinances.

On the day heretofore mentioned, claimant was performing her usual duties in and about the relief office when she arose from her chair to reach for certain papers which were on the far corner of her desk, and as she attempted to sit down, she misjudged the position of her chair, striking the projection

protruding from the side of the desk and the floor. Claimant continued to work throughout the day and also the following day but complained to Harry A. McLain about the soreness in her side and back.

Harry A. McLain, Greenville, Illinois, former executive director of the Bond County Emergency Relief Committee, informed the Illinois Emergency Relief Commission that on November 30, 1934, he witnessed the accident which occurred to Clara R. Bailey. See Exhibit I.

Claimant was under the care of Dr. H. D. Cartwell, Greenville, Illinois, from the 3rd day of December, 1934, to the 27th day of December, 1934. Dr. H. D. Cartwell testified at the hearing on September 11, 1936, which evidence was taken in the office of Meyer & Meyer, Greenville, Illinois, that Clara R. Bailey came to his office on the 3rd day of December, 1934, at which time the patient complained of soreness of her left side and back and that said soreness was caused by a fall she had sustained while working for the Bond County Emergency Relief Committee. At this time the patient was strapped and told to remain in bed as there was a possibility of a slight infection in the kidney. Dr. Cartwell further testified that the patient responded to treatment and that the last treatment he rendered was on the 27th day of December, 1934. Dr. Cartwell further testified that the bill rendered the patient for his services was Fourteen Dollars (\$14.00).

Dr. A. M. Keith, Greenville, Illinois, testified at the hearing on September 11, 1936, that Clara R. Bailey first appeared at his office on the 13th day of February, 1935. At that time the patient complained of a sore back and stiffness about the shoulders and neck and that she had informed him that she had been receiving treatment from Dr. H. D. Cartwell but she had discharged Dr. Cartwell and wished to be treated by him because he was an osteopath. Dr. Keith further testified that he treated the patient until the 8th day of June, 1935, when he considered that the patient had recovered and was not in need of further treatment. Dr. Keith further testified that Clara R. Bailey was rendered a bill in the sum of Sixty Dollars (\$60.00) for professional services; further that Forty Dollars (\$40.00) of the above amount had been paid by the patient.

As a result of the accident, claimant has incurred medical and doctor bills in the sum of Seventy-Four Dollars (\$74.00).

part of which has been paid by her, and the remaining sum is still due said doctors.

Claimant's accident was in the course of, and arose out of, her employment. Further, the Illinois Emergency Relief Commission had notice of the accident and demand for compensation was made on her employer within six months after the accident.

At the time of the accident, claimant was married and had two children under sixteen years of age.

Claimant is not asking for temporary total or permanent total disability as she received her full salary in the sum of One Hundred Dollars (\$100.00) per month during the period of her disability.

In the course of claimant's work, electrically driven motors were operating in said building. There was also a steam boiler operating in the basement.

Section 3, sub-paragraph 8, of the Workmen's Compensation Act of the State of Illinois, provides:

"In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra hazardous. * * *

Section 8, paragraph (a), of the Workmen's Compensation Act of the State of Illinois, provides:

"The employer shall provide the necessary first aid medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury. * * *

Claimant has agreed to accept Seventy-four Dollars (\$74.00) in full settlement for her injuries and further to dismiss the suit which is known as *Clara N. Bailey vs. State of Illinois*, No. 2739, which is now pending before the Court of Claims. Claimant has also executed releases and waivers to the Illinois Emergency Relief Commission.

COPY.

ILLINOIS EMERGENCY RELIEF COMMISSION.
PRELIMINARY REPORT OF ACCIDENT.*Report in Duplicate to Workmen's Protection Dept., 1319 S. Michigan Ave.,
Chicago, Illinois.*

| | |
|---|--|
| Employer, Place and Time | Local Governmental Unit: Bond Co. Emergency Relief Com. Project No. Office Address: Street and No.: 101 E. Oak St. County: Bond. City or Vil- lage: Greenville, Ill. Nature of Work: Accounting Supervisor. <i>Location of place where accident happened--</i> Street and No.: 101 E. Oak St. County: Bond. City or Village Greenville, Ill. <i>Date of Accident:</i> Nov. 30, 1934. Hour of Day: 10:00 o'clock a. m. |
| Injured Employee | <i>Name of Employee:</i> Clara E. Bailey. Address: Green- ville Ill. <i>Age:</i> <i>Sex:</i> Female. <i>Speak English?</i> Yes. <i>Na-</i> <i>tionality:</i> American. <i>Identification No.</i> <i>Single.</i> <i>Married.</i> ... <i>Divorced.</i> <i>Occupation when injured:</i> Accounting Supervisor <i>Was this regular occupation?</i> Yes. <i>Wages or average earnings per day:</i> \$100 per month <i>Working hours per day:</i> 8 hours. <i>Working hours per</i> <i>week:</i> 44. <i>Per month:</i> 176. <i>Average weekly wages:</i> \$25. <i>How long employed:</i> 14 months. <i>If injured under sixteen years have you his school cer-</i> <i>tificate on file?</i> |
| Cause (Use back of form if more space is needed) | <i>Describe in Full How Accident Happened:</i> Missed chair on attempting to sit down at desk, injuring, on chair lower left side. <i>Names and addresses of witnesses to the accident:</i> Harry A. McLain, Greenville, Ill.; Charles E. Lewis, Green- ville, Ill. <i>Name of machine, tool or appliance in connection with</i> <i>which accident occurred:</i> by what power driven; <i>hand feed or mechanical feed part on</i> <i>which accident occurred.</i> |
| | <i>State exactly part of person injured and nature of in-</i> <i>jury:</i> Lower left side, see doctor's report. <i>How many children under 16 years of age has injured:</i> Two. <i>Give age of each:</i> 11, 14. <i>Did injury cause loss</i> <i>of any member or part of member? If so, describe</i> <i>exactly</i> |

Days lost from work on account of accident.....
 Attending physician or hospital where sent:.....
 Name and address: Dr. H. D. Cartmell.
 Nature and
 Extent of
 Injury *Has injured employee returned to work? No. If so, give date.....* Has any relief or other monetary assistance been given? No. Amount..... Amount paid for hospital or medical services, if any \$..... None.
 If Fatal: Date of employee's death.
 Length of disability before death.....
 Single or married.....
 Name and P. O. Address of a relative or friend of the deceased.....
 Date of this report: Dec. 5, 1934. Made out by Harry A. McLain. Title: Executive Director.

Exhibit I.

ADVISORY OPINION BY MR. JUSTICE YANTIS.

To the Illinois Emergency Relief Commission:

Pursuant to your request for an Advisory Opinion, based upon the attached statement of facts submitted by you in the matter of the claim of *Clara E. Bailey vs. Illinois Emergency Relief Commission*, the following Opinion is rendered, based upon the aforementioned statement:

In November, 1934 claimant was employed as an accounting supervisor for the Bond County Emergency Relief Committee, at 101 East Oak Street, Greenville, Illinois. From the statement of facts submitted by respondent, the following appears: On the 30th day of November, 1934 while performing her usual duties in and about the Relief Offices she arose from her chair to reach for certain papers which were on the far corner of her desk, and as she attempted to sit down claimant misjudged the position of her chair, striking the projection protruding from the side of the desk and the floor. She continued to work through that day and the following day, but complained to the Executive Director of the Bond County Emergency Relief Committee about soreness in her side and back. Mr. McLain apparently witnessed the accident, and made a report of same on December 3, 1934, showing that claimant had been directed to Dr. H. D. Cartmell. From statements attributed to Dr. Cartmell it appears that she went to him on December 3rd, complaining of soreness in

her left side and back; that Dr. Cartmell taped her sides and told her to remain in bed; that she responded to treatment and that the last treatment he gave her was on the 27th day of December, 1934. His bill for such services was Fourteen (\$14.00) Dollars and the record does not disclose whether same remains unpaid, or by whom paid.

After being discharged by Dr. Cartmell, claimant appears to have gone at her own accord to an osteopath by the name of Dr. A. M. Keith, who treated the patient until the 8th day of June, 1935, when he considered that she had recovered and was in need of no further services. It further appears that he rendered claimant a bill for Sixty (\$60.00) Dollars, Forty (\$40.00) Dollars of which has been paid by her. It further appears that her full salary at the rate of One Hundred (\$100.00) Dollars per month was paid to her during the time of her disability; the total amount that was so paid to her for unproductive time being One Hundred Ninety-nine and 97/100 (\$199.97) Dollars. Thereafter she filed a claim known as *Clara E. Bailey vs. State of Illinois*, No. 2739, in this court, and under your statement of facts submitted, indicates her willingness to settle whatever right she may have, including unpaid doctor bills, for the sum of Seventy-Four (\$74.00) Dollars. By her statement, in a transcript of evidence submitted from the Attorney General's office, it appears that she was incapacitated from work from December 2nd to December 27, 1934, and from February 9, 1935 to March 25, 1935, a total of nine (9) weeks.

There is considerable question in the court's mind from the statement of facts submitted as to whether claimant's accident is compensable. Her duties were apparently entirely clerical and there is nothing in the record to show that she was brought into contact with relief clients, or that any part of her work subjected her to hazardous exposure. However that may be, we are of the opinion that no compensation would be due, for it further appears that for the nine weeks during which she was absent from work during December, February and March, she was paid approximately One Hundred Ninety-nine and 72/100 (\$199.72) Dollars. All of this was for unproductive time during which, compensation, if payable, would have amounted to only One Hundred Eight (\$108.00) Dollars. Therefore, Ninety-one and 72/100 (\$91.72) Dollars would be chargeable against any award to which she

might be entitled for any additional time. There is nothing in the record to disclose that she would be entitled to an award in excess of such sum, and therefore in the opinion of the court payment of the further sum of Seventy-five (\$75.00) Dollars to her by your commission, in settlement of her demands is not justified; nor would claimant be entitled to any award by this court upon the record before us. Her employment of Dr. Keith was without apparent authority from her superiors and was entirely upon her own initiative, and she would not be entitled, under the terms of the Workmen's Compensation Act, to any award and payment for such services.

We therefore recommend that the proposed settlement be declined.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 32.

Settlement of claim for \$1,050.00 found to be justified.

JOHN DE COSTA, Claimant vs. ILLINOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed June 20, 1938.

STATEMENT OF FACTS.

John De Costa, 522 South Aberdeen Street, Chicago, Illinois, claims that on the 17th day of July, 1934, he sustained an accidental injury to his penis, scrotum, right arm, left side of his jaw, and to the small of his back while working as a sewing machine mechanic for the Illinois Emergency Relief Commission on Project 1-D1-348. Said project was requested by Leo M. Lyons, Relief Administrator for Cook County, for labor to operate sewing room which manufactured clothing for clients of the Illinois Emergency Relief Commission. Said project was approved by A. R. Lord, Illinois Emergency Relief Commission State Administrator of Work Relief. Said project provided for the employment of foreladies, operators, inspectors, office clerk, janitress, janitor, shipping clerk, stock man, stenographer, cutters, cutter superintendent, production manager, sewing machine mechanics, superintendent of shipping room, and superintendent of stock room. Said project was supervised by the American Red Cross, Chicago Chapter,

616 South Michigan Avenue, Chicago, Illinois. The total cost of said project was \$10,920.00. All monies were furnished by the Illinois Emergency Relief Commission. Said project was approved on the 18th day of June, 1934, and all work was completed on or about the 3rd day of July, 1935.

The Illinois Emergency Relief Commission was created by an Act of the General Assembly of the State of Illinois, effective February 6, 1932. Chapter 23, Section 464, of the Illinois State Bar Statutes, 1935, sets out the duties of said commission, which are as follows:

"Powers and duties. It shall be the duty of the commission until March 1, 1937, to provide relief to residents of the State of Illinois, who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any other means deemed desirable by the commission. For the purpose of carrying out the provisions of this Act, the commission may make use of and co-operate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission has created many departments within itself since its creation through which relief is administered; such as maintenance department, furniture shops, mattress factories, canneries, work relief divisions and other divisions or departments too numerous to mention. Said maintenance department has charge of maintenance work in all buildings operated by the Illinois Emergency Relief Commission. Said work includes plumbing, carpentry, janitor work, engineering, and general repair work. Said furniture shops manufacture furniture which is used in relief offices throughout the State. Said mattress factories manufacture mattresses for relief recipients and for shelters operated by the Illinois Emergency Relief Commission. Said canneries preserve vegetables and fruits which have been grown by relief recipients on Illinois Emergency Relief Commission soil. Said work relief divisions furnish men to the State Highway Department, counties, townships, cities and parks for general maintenance work. All of the above enterprises or projects use sharp-edged cutting tools such as saws, chisels, mattocks and axes. Said buildings operate electric motors, elevators and boilers, all of which are governed by municipal ordinances.

Claimant was assigned to work for the Illinois Emergency Relief Commission on Project F1-3909 on or about the 15th

day of February, 1934, and was transferred to Project 1-D1-348 on or about the 18th day of June, 1934. On the last mentioned project, claimant was to work six (6) hours per day, thirty (30) hours per week, and the rate of pay was Seventy Cents (70c) per hour.

Claimant was directed by George Follman, maintenance manager for the Illinois Emergency Relief Commission at 510 East 51st Street, Chicago, on the day heretofore mentioned to repair a sewing machine which had become out of repair. Said sewing machine was one of a series which were mounted on a table. Said table was approximately forty-eight (48) feet long and four (4) feet wide and two and one-half (2½) feet from the floor. Under the table about one (1) foot from the floor was a main metal shaft which revolved about six hundred (600) revolutions a minute. On said shaft were approximately twenty (20) rollers and pulleys and over each pulley was a five-sixteenths (5/16) of an inch leather belt which was connected with the sewing machine on the table. In order to make the necessary repairs, claimant removed the belt from the roller. Said belt became tangled in the main shaft and the sleeve of claimant's coveralls became entangled in the main shaft and the belt. As a result of this, claimant was wound into the shaft of the machine. Said machine tore his penis and scrotum, tearing the entire skin off, tearing open his scrotum, so that the testicles were completely out of the scrotum. He was pulled into the moving shaft, all of his clothing was torn off of him and wound into the machinery. After the accident, claimant was immediately taken to Mercy Hospital, Chicago, where he remained until the 14th day of September, 1934.

George Follman testified on the 18th day of July, 1935, that at the time of the accident he was employed by the Illinois Emergency Relief Commission as maintenance manager at 510 East 51st Street; that his duties were to take care of the maintenance of the building and machinery and all the equipment located in said building; further, that John De Costa was working under his supervision and control; that all complaints relative to the operation of sewing machines were made to him and it was then his duty to see that one of the sewing machine mechanics made the necessary repairs; that on said day he directed John De Costa to make certain

repairs on one of the machines; that while in the course of his work he sustained an accidental injury. As soon as this accident occurred, he made arrangements for John De Costa to be taken to the Mercy Hospital and for Dr. Charles H. Connor to attend him.

Dr. Charles H. Connor testified on the 28th day of August, 1935, that he had graduated from the Loyola University School of Medicine in 1917, that he was affiliated with Mercy Hospital, a member of the senior surgical staff, and that on the 17th day of July, 1934, he saw John De Costa for the first time. At this time claimant was suffering from shock due to trauma; on further examination he found that the skin had been torn off his penis and the penis was bleeding quite severely. The skin on the pubis to the extent of one-half inch was torn above the penis on the pubis and about one inch below on the scrotum. There was severe trauma also to the scrotum, to the testis and the vas deferens. That on the 21st day of August, a skin graft was performed. That on the 6th day of September his skin graft was completed. It was impossible to complete a complete skin graft in one operation. Dr. Connor further testified that dressings were done daily and on many occasions twice a day. This continued until the 21st day of August, when the first skin graft was performed. The patient was discharged from the hospital on the 14th day of September but continued under Dr. Connor's care until the 14th day of October, 1934. At the time John De Costa was discharged from the hospital, the penis itself was much smaller than it had been on entrance due to the fact that the skin graft had drawn the penis down.

Dr. Michael I. Reiffel testified on the 28th day of August, 1935, that he was a graduate of the University of Illinois Medical School, receiving a Doctor of Medicine in 1919; that he was affiliated with the American Hospital of Chicago; that he examined John De Costa on the 19th day of July, 1935, at his office. The subjective findings at the time of the examination were that he could not perform sexual acts and that he could not have an erection and found also that the penis was decidedly smaller than that of the average man of his age and stature and that it felt hard and contracted, that the surfaces were scarred, particularly that the pubic hair extended over the proximal hair near the organ. There was a scar that extended on the entire surface which was the result

of surgical procedure. The organ was sensitive to touch and on examining the scrotum he found that the spermatic cord which contains the vas deferens, the artery, nerve and vas, which supplies the testicles both on the right and left side, and the epididymis were still increased over the normal size. Dr. Reiffel further testified that John De Costa could not have an erection; first, due to the scarification of the organ proper, the contraction of the connective tissue, it causes a shrinking of the anatomical parts; second, the skin grafts which are put on under tension will inhibit that organ from increasing in size in order to get an erection; the third is one of nervous inhibition due to the injury to the posterior portion of the urethra which contains the nerve endings which regulate the erection.

Both Dr. Charles H. Connor and Dr. Michael I. Reiffel are of the opinion that John De Costa's condition is permanent.

Claimant was asked to submit to another examination on the 25th day of February, 1936. Said examination was made by Dr. Leander William Riba, an outstanding urology surgeon of Chicago, Illinois. Dr. Riba is on the surgical staff of Passavant Hospital and head of the out-patient clinic at Northwestern University where he teaches. Dr. Riba testified on the 21st day of April, 1936, that John De Costa complained of his inability to have sexual intercourse since the accident. The examination was confined to the internal and external genital organs. The examination of the external genitals revealed some scarring of the anterior surface of the scrotum. There was some scarring of the shaft of the penis. There was some shortening of the shaft of the penis due to scar tissue on the ventral side. The examination of the scrotal contents revealed two testicles both of which, however, were small, the right smaller than the left. These testicles were firm, normal to palpation, except for their small size. In the right scrotal sac the epididymis was thickened and tender to palpation. Examination of the prostate by way of rectal examination revealed prostate which was slightly larger than normal and was infiltrated and was tender. The secretion of the prostate contained 50 to 75 pus cells per high power field. It was found that the urethra had many ridges occurring due to scar tissue. Said obstructions were of various sizes. From the evidence which was found on urological examination, the following diagnoses were made: First, multiple fibrous strictures of the

anterior urethra. Second, prostate-vesiculitis (grade 2). Third, scarring of the scrotum. Fourth, thickening of the buck's penis. Fifth, shortening of the penile scrotal angle. Sixth, small testicles. Seventh, right epididymitis. Dr. Riba was of the opinion from his examination that John De Costa would still have considerable function from the testicles. He has a partial loss of the use of the testicles. His partial loss is due to: First, multiple stricture of the urethra. Second, infection of the prostate gland. Third, scarring of the shaft of the penis and scrotum.

Dr. Riba is of the opinion that John De Costa does not have enough scarring to keep him from performing sexual intercourse provided he could get an erection. Dr. Riba further stated that he had organic lesions which may make him impotent at the present time. In this case there is combination of high grade strictures and prostatic infection which have great bearing on the patient's impotency. Dr. Riba is of the opinion that John De Costa's condition can be completely relieved by proper medical care and surgery.

Dr. Charles H. Connor has submitted a medical bill for One Hundred Fifty Dollars (\$150.00) for professional services rendered. Said bill has been examined and found to be reasonable for the services rendered. See Exhibit I. All other hospital and doctors' bills and medical bills have been paid by the Illinois Emergency Relief Commission.

Claimant's accident was in the course of, and arose out of, his employment. Further, the Illinois Emergency Relief Commission had notice of the accident and demand for compensation was made on the employer within six months after the accident.

Section 3, sub-paragraph 8, Workmen's Compensation Act

"In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra hazardous: * * *

Section 8, Paragraph (a), Workmen's Compensation Act

"The employer shall provide the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury * * *

Section 8, Paragraph (c), sub-paragraph 16¾ Workmen's Compensation Act

For the loss of a testicle, fifty percentum of the average weekly wage during fifty weeks, and for the loss of both testicles, fifty percentum of the average weekly wage during one hundred fifty weeks.

Section 8, Paragraph (d), Workmen's Compensation Act

If, after the injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall, except in the cases covered by the specific schedule set forth in paragraph (c) of this section, receive compensation, subject to the limitations as to time and maximum amounts fixed in paragraphs (b) and (h) of this section, equal to fifty percentum of the difference between the average amount which he earned before the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident.

At the time of the accident, claimant was living with his wife and five children: Elvira, 18; Mary, 17; Margaret, 15; Lillian, 13, and Catherine, 10.

Dr. Charles Connor and Dr. Michael Reiffel are of the opinion that claimant has suffered a permanent and complete loss of the use of the testicles. Dr. Leander W. Riba is of the opinion that claimant has loss of function of the testicles but that same can be restored by surgical and medical treatment.

Claimant filed a petition in the Court of Claims which is known as *John De Costa vs. State of Illinois*, No. 2652. Said claim is now pending before the court. A release and waiver has been secured by the Illinois Emergency Relief Commission and a stipulation to dismiss the above-entitled cause has been filed with the Court of Claims. Claimant and his attorney have agreed to accept Nine Hundred Dollars (\$900.00) in full settlement of his injuries and the payment of One Hundred Fifty Dollars (\$150.00) to Dr. Charles H. Connor for his medical bill.

COPY.

Monthly Statement

Chicago, Ill., Jan. 25, 1938.

Mr. John DeCosta

DR. CHARLES H. CONNOR
7054 South Park Avenue
Telephone Stewart 8273

To Professional Services Rendered
Employee Illinois Emergency Relief Factory, 510 East 51st
St. While at work clothing caught in a machine and tore the

entire skin from penis. He had to be dressed twice daily for some time then once a day for some months. Two operations performed for skin graft.

| | |
|---|-----------|
| 1st operation on Aug. 21..... | \$ 25.00 |
| 2nd operation, Sept. 6..... | 25.00 |
| 100 dressings and calls at \$1.00 each..... | 100.00 |
| Total | \$ 150.00 |

Page 2.

(Itemized statement continued)

Dates of Dressings and Calls

| | | | | |
|---------|---------|---------|----------|----------|
| July 17 | July 26 | Aug. 6 | Aug. 26 | Sept. 19 |
| July 17 | July 26 | Aug. 7 | Aug. 27 | Sept. 20 |
| July 18 | July 27 | Aug. 8 | Aug. 28 | Sept. 21 |
| July 18 | July 27 | Aug. 9 | Aug. 29 | Sept. 22 |
| July 19 | July 28 | Aug. 10 | Aug. 30 | Sept. 23 |
| July 19 | July 28 | Aug. 11 | Sept. 1 | Sept. 24 |
| July 20 | July 29 | Aug. 12 | Sept. 2 | Sept. 25 |
| July 20 | July 29 | Aug. 13 | Sept. 3 | Sept. 26 |
| July 21 | July 30 | Aug. 14 | Sept. 4 | Sept. 27 |
| July 21 | July 30 | Aug. 15 | Sept. 5 | Sept. 28 |
| July 22 | July 31 | Aug. 16 | Sept. 6 | Sept. 29 |
| July 22 | July 31 | Aug. 17 | Sept. 7 | Sept. 30 |
| July 23 | Aug. 1 | Aug. 18 | Sept. 8 | Oct. 1 |
| July 23 | Aug. 1 | Aug. 19 | Sept. 9 | Oct. 2 |
| July 24 | Aug. 2 | Aug. 20 | Sept. 10 | Oct. 4 |
| July 24 | Aug. 2 | Aug. 21 | Sept. 11 | Oct. 6 |
| July 25 | Aug. 3 | Aug. 22 | Sept. 12 | Oct. 8 |
| July 25 | Aug. 4 | Aug. 23 | Sept. 13 | Oct. 10 |
| | Aug. 5 | Aug. 24 | Sept. 14 | Oct. 12 |
| | | Aug. 25 | Sept. 15 | Oct. 14 |
| | | | Sept. 16 | |
| | | | Sept. 17 | |
| | | | Sept. 18 | |

Exhibit I.

ADVISORY OPINION BY MR. JUSTICE YANTIS.

To the Illinois Emergency Relief Commission:

Pursuant to your request for an Advisory Opinion, based upon the attached statement of facts submitted by you in the matter of the claim of *John De Costa vs. Illinois Emergency Relief Commission*, the following Opinion is rendered, based upon the aforementioned statement:

John DeCosta, 522 S. Aberdeen Street, Chicago, Illinois, was assigned to work for the Illinois Emergency Relief Com-

mission on or about the 15th day of February, 1934, and on or about the 18th day of June, 1934 was assigned to Project 1-D-1-348. His employment called for thirty (30) hours per week at Seventy (70) Cents per hour. Claimant was directed on July 17, 1934 to repair a sewing machine, same being one of a series which were mounted on a table forty-eight feet long. Under the table was a metal shaft which revolved about six hundred revolutions per minute, and on the shaft were twenty rollers and pulleys, over which leather belts operated to connect with the sewing machines on the table above. In making the repairs claimant removed the belt from the roller, it became tangled in the main shaft and claimant's sleeve was caught and he was wound into the shaft; all of his clothing was torn from him; the entire skin was torn from his penis; the scrotum was torn open and his testicles were completely out of the scrotum. He was immediately taken to Mercy Hospital where he remained until the 14th day of September, 1934. He there had the services of several physicians and surgeons. Dr. Charles H. Connor states that on the 17th day of July, 1934 he saw John De Costa at Mercy Hospital; that claimant was suffering from shock due to trauma; that he found upon examination that the skin had been torn from claimant's penis and that same was bleeding severely; the skin on the pubis to the extent of one-half inch was torn; there was also severe trauma to the scrotum, testis and vas deferens. Two operations were performed for skin graft and frequent daily dressings were made on the patient until the 14th day of September, when he was discharged from the hospital, but he continued under Dr. Connor's care for a month thereafter. Dr. Michael I. Reiffel states, according to the record, that he examined claimant on the 19th day of July, 1935; that the scar resulting from the skin graft extended on the entire surface of the penis; that no erection could be had; that on examination of the scrotum he found the spermatic cord which contains the vas deferens, the artery, nerves and vas were all affected.

Dr. L. W. Riba, of the surgical staff of Passavant Hospital, testified that he examined claimant on the 21st day of April, 1936; that the shaft of the penis is shortened due to scar tissue on the ventral side; that the scrotal contents revealed that both testicles were of decreased size and the epi-

didymis in the right scrotal sac was thickened and tender to palpation; further, that the prostrate contained a high secretion of pus cells and that the urethra had many ridges, due to scar tissue. Dr. Riba's conclusion was that claimant has a loss of use of the testicles due to, first, multiple stricture of the urethra—second, infection of the prostate gland—third, scarring of the shaft of the penis and scrotum, and that claimant is impotent at the present time. Dr. Connor and Dr. Reiffel are of the opinion that his condition is permanent. At the time of the accident claimant was living with his wife and five children, three of whom were under the age of sixteen years. He filed a petition in the Court of Claims under the title of *John De Costa vs. State*, No. 2652, said claim being made under the provisions of *Section 8, Paragraph (c), Sub-paragraph 16¾, Workmen's Compensation Act of Illinois* which provides:

"For the loss of a testicle, fifty percentum of the average weekly wage during fifty weeks, and for the loss of both testicles, fifty percentum of the average weekly wage during one hundred fifty weeks."

The statement submitted here indicates that claimant and his attorney have now agreed with the Illinois Emergency Relief Commission to accept Nine Hundred (\$900.00) Dollars in full settlement of his injuries, plus the payment of One Hundred Fifty (\$150.00) Dollars to Dr. Charles H. Connor for the latter's bill for services rendered.

The court finds that from the facts submitted claimant would be entitled to compensation in an amount not less than the sum indicated in the offer for settlement, and we are of the opinion that settlement with claimant under the facts stated is fully warranted under the provisions of said Section 8, Paragraph (c), Sub-Paragraph 16¾ of the Act.

In making payment the following conditions should be observed: First, payment of compensation shall be made by the Illinois Emergency Relief Commission out of any funds held by it and allocated for the payment of such claim. Second, that the claim of *John De Costa vs. State of Illinois, Court of Claims*, No. 2652, now pending, shall be dismissed.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 33.

Payment of \$453.75, advised.

ROBERT C. EARDLEY, Claimant vs. ILLINOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed September 14, 1938.

STATEMENT OF FACTS.

Robert C. Eardley, 527 Melrose Street, Chicago, Illinois, claims to have sustained a laceration and contusion to the right side of his forehead and an injury to his back on the 25th day of January, 1938, while working as a legal representative for the Illinois Emergency Relief Commission.

Mr. Eardley had various duties to perform as a legal representative for the Illinois Emergency Relief Commission such as; prepare and try civil suits in the Circuit, Superior, County and Municipal Courts in Chicago and throughout the State; assist the Assistant State's Attorney in prosecution of fraud cases where the Relief Commission is involved; file claims in the Probate and County Courts against estates where deceased had secured relief by perpetrating a fraud; investigate indiscretions committed by relief recipients or employees in Chicago and throughout the State; interview in the office relief recipients who have threatened or intimidated case workers in the district offices or caused disturbances there.

On the day heretofore mentioned, Mr. Eardley and Mr. R. M. Hilliard, his superior, were driving to Springfield, Illinois, on State Route No. 66 in a 1938 Studebaker Sedan, which was being operated by Mr. Hilliard. When the car was approximately one mile north of Atlanta, Illinois, the car struck a thin sheet of ice and suddenly swerved to the left hand side of the road and headed for the ditch. When the car struck the soft shoulder on the side of the road, it rolled over four times. As a result of the accident the car was completely demolished.

After the accident, Mr. Eardley was in a semi-conscious condition so was immediately taken to Dr. R. Lynn Ijams' office, Atlanta, Illinois, where the laceration on the forehead was sutured and treatment for shock was administered. From there, Mr. Eardley was taken by ambulance to St. Clara's

Hospital, Lincoln, Illinois, where tetanus serum was injected and X-ray pictures were taken of his chest and back. The following day, Mr. Eardley was removed to Chicago, Illinois, and placed in the Passavant Memorial Hospital, where more X-ray pictures were taken. Mr. Eardley remained in said hospital until January 30, 1938.

Mr. Eardley was attended by Dr. James K. Stack, who is an orthopedic surgeon, and also by Dr. William A. Mann and Dr. Leander W. Riba.

Record of the Illinois Emergency Relief Commission show that from September, 1933, to and inclusive of July, 1938, there have been 532 disorderly conduct and assault and battery cases involving case workers and other employees in the employment of the Illinois Emergency Relief Commission. Said assaults were perpetrated by relief recipients while investigators were trying to investigate whether or not these individuals were eligible for relief. Of the above number, 499 were prosecuted in the Criminal Courts throughout the State. Of said number, 316 were found guilty of the charges heretofore alleged and 89 of said number were found not guilty; 43 of said number were dismissed by the court, and 33 of said number were dismissed for want of prosecution; 17 of said number were discharged and then sent to psychopathic hospitals, and one individual was committed directly to a psychopathic hospital.

Section 3 of the Workmen's Compensation Act of the State of Illinois provides:

"The provisions of this Act hereinafter following shall apply automatically and without election to the State, County, city, town, township, incorporated village or school district, body politic or municipal corporation, and to all employers and all their employees, engaged in any department of the following enterprises or business which are declared to be extra hazardous
* * *"

Section 3, subsection 8, of the Workmen's Compensation Act of the State of Illinois provides:

"In an enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra hazardous; Provided, nothing contained herein shall be construed to apply to any work, employment or operations done, had or conducted by farmers and other engaged in farming, tillage of the soil, or stock raising, or to those who rent, demise or lease land for any such purposes, or to any one in their employ or to

any work done on a farm or country place, no matter what kind of work or service is being done or rendered."

Section 8, subsection (a), of the Workmen's Compensation Act of the State of Illinois provides:

"The employer shall provide the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury * * *"

The doctors, hospitals, and medical bills are as follows:

| | |
|--|-----------|
| Dr. R. Lynn Ijams..... | \$ 15.00 |
| Said sum includes suturing of laceration and treatment for shock. | |
| Dr. James K. Stack..... | \$ 250.00 |
| Said sum includes removing of sutures, examination and treatments. | |
| Dr. William A. Mann..... | \$ 15.00 |
| Said sum includes examination for treatment of the right eye. | |
| Dr. Leander W. Riba..... | \$ 3.00 |
| Said sum includes examination of kidneys. | |
| St. Claras Hospital..... | \$ 19.05 |
| Said sum includes X-ray pictures, tetanus serum, emergency care and board. | |
| Passavant Memorial Hospital..... | \$ 51.45 |
| Said sum includes X-ray pictures, chemistry, drugs and board. | |
| Ultra-Ray Lamp | \$ 39.75 |
| Infra-Red Lamp | \$ 8.50 |
| Sacro Iliac Belt..... | \$ 12.00 |
| Steam Baths | \$ 40.00 |

Doctors, hospitals, and medical bills have been examined and found to be reasonable and fair for services rendered. The total sum of \$453.75 has been incurred as a result of said accident. The sum of \$100.25 of this amount has been paid by Mr. Eardley. There remains \$353.50 unpaid at this date.

Said accident arose out of, and was in the course of Mr. Eardley's employment. The Illinois Emergency Relief Commission had notice of said accident shortly after it occurred.

Mr. Eardley's claim is for doctors, hospitals, and medical care and no claim is being made for temporary total or permanent total disability.

SUPPLEMENTARY STATEMENT OF FACTS.

In the supplementary statement of facts the Illinois Emergency Relief Commission wishes to show the powers and duties of the Illinois Emergency Relief Commission.

The Illinois Emergency Relief Commission was created by an Act of the General Assembly of the State of Illinois effective February 6, 1932. Chapter 23, Section 464 of the Illinois Bar Statutes 1935 sets out the duties of said commission which are as follows:

"Powers and Duties. It shall be the duty of the Commission until March 1, 1937, to provide relief to residents of the State of Illinois, who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any means deemed desirable by the Commission. For the purpose of carrying out the provisions of this Act, the Commission may make use of and cooperate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission has created many Departments within itself since its creation through which relief is administered; such as Maintenance Departments, Furniture Shops, Mattress Factories, Canneries, Work Relief Divisions and other Divisions or Departments too numerous to mention. Said Maintenance Department has charge of maintenance work in all buildings operated by the Illinois Emergency Relief Commission. Said work includes plumbing, carpentry, janitor work, engineering, and general repair work. Said Furniture Shop manufactures furniture which is used in relief offices throughout the State. Said Mattress Factories manufacture mattresses for relief recipients and for shelters operated by the Illinois Emergency Relief Commission. Said Canneries preserve vegetables and fruits which have been grown by relief recipients on Illinois Emergency Relief Commission soil. Said Work Relief Division furnishes men to the State Highway Departments, counties, townships, cities and parks for general maintenance work. All of the above enterprises or projects use sharp-edged cutting tools such as saws, chisels, mattocks and axes. Said buildings operate electric motors, elevators and boilers, all of which are governed by municipal ordinances.

ADVISORY OPINION BY MR. JUSTICE YANTIS.

To the Illinois Emergency Relief Commission:

Pursuant to your request for an Advisory Opinion, based upon the attached statement of facts submitted by you in the matter of the claim of *Robert C. Eardley vs. Illinois Emergency Relief Commission*, the following Opinion is rendered, based upon the aforementioned statement:

It appears from the statement of facts submitted that claimant was, on the 25th day of January, A. D. 1938, employed as a legal representative for the Illinois Emergency Relief Commission.

That in addition to his duties of appearing and trying civil suits in the various courts of this State, he was required to assist the States Attorney's Office in the prosecution of fraud cases involving relief clients, and in connection therewith to file claims in the Probate and County Courts where relief was charged to have been secured by fraud. His duties further necessitated investigation by him of improper actions committed by relief recipients throughout the State, and to interview such relief recipients who have threatened or intimidated case workers or caused disturbances in the District Offices of the Commission. That on the day stated Mr. Eardley, while in the course of his duties, was driving to Springfield, Illinois on State Route No. 66 in the car then operated by his superior, Mr. R. M. Hilliard, approximately one mile North of Atlanta, Illinois, the car struck a thin sheet of ice, swerved to the lefthand side of the road, rolled over four times and was completely demolished. Claimant was rendered semi-conscious by the accident and was immediately taken to a Doctor's Office at Atlanta, Illinois, where first-aid was rendered and sutures taken in the cuts in the forehead. From there he was taken by ambulance to the hospital at Lincoln, Illinois, and the following day was removed to Chicago Passavant Memorial Hospital, where he remained until January 30, 1938. It further appears from the supplemental statement filed herein that:

"The Illinois Emergency Relief Commission was created by an Act of the General Assembly of the State of Illinois effective February 6, 1932. Chapter 23, Section 464 of the Illinois Bar Statutes 1935 sets out the duties of said commission which are as follows:

"Powers and Duties. It shall be the duty of the Commission until March 1, 1937, to provide relief to residents of the State of Illinois, who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any means deemed desirable by the Commission. For the purpose of carrying out the provisions of this Act, the Commission may make use of and cooperate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission has created many Departments within itself since its creation through which relief is administered; such as Maintenance Departments, Furniture Shops, Mattress Factories, Canneries, Work Relief Divisions and other Divisions or Departments too numerous to mention. Said Maintenance Department has charge of maintenance work in all buildings operated by the Illinois Emergency Relief Commission. Said work includes plumbing, carpentry, janitor work, engineering, and general repair work. Said Furniture Shop manufactures furniture which is used in relief offices throughout the State. Said Mattress Factories manufacture mattresses for relief recipients and for shelters operated by the Illinois Emergency Relief Commission. Said Canneries preserve vegetables and fruits which have been grown by relief recipients on Illinois Emergency Relief Commission soil. Said Work Relief Division furnishes men to the State Highway Departments, counties, townships, cities and parks for general maintenance work. All of the above enterprises or projects use sharp-edged cutting tools such as saws, chisels, mattocks and axes. Said buildings operate electric motors, elevators and boilers, all of which are governed by municipal ordinances."

The records of the I. E. R. C. show that from September, 1933 to July, 1938 there have been five hundred thirty-two (532) disorderly conduct and assault and battery cases involving case workers and other employees of the I. E. R. C., said assaults being perpetrated by relief recipients in the course of their contacts with I. E. R. C. employees. Of this number four hundred ninety-nine (499) were prosecuted in the Criminal Courts of the State. Seventeen (17) were sent to psychopathic hospitals and three hundred sixteen (316) others found guilty of the charge.

We have heretofore held that case workers who have suffered accidental injuries in the course of the performance of their duties for the Illinois Emergency Relief Commission

were engaged in work of a hazardous nature, and that injuries sustained by them arising out of and in the course of their employment were compensable. While claimant herein was engaged in the performance of legal duties, the actual services performed by him apparently necessitated the same contacts in many instances as those of case workers. From the statement of facts submitted we do not believe a distinction can properly be drawn between those cases in which payment of compensation has been approved, and the present case.

We are therefore of the opinion that the Commission is properly justified in recognizing Mr. Eardley's claim for doctor, hospital and medical bills sustained by him, in the sum of Four Hundred Fifty-three and 75/100 (\$453.75) Dollars for injuries incurred as the result of said accident. No question of compensation is raised in the statement submitted either for temporary or permanent disability. Payment of the claim as hereinabove stated is recommended, same to be made by the Illinois Emergency Relief Commission out of any funds held by it and allocated for such purpose.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 34.

Settlement of claim for \$50.00 found to be proper and advisable.

**JOHN W. SMITH, Claimant vs. ILLINOIS EMERGENCY RELIEF
COMMISSION, Respondent.**

Opinion filed December 20, 1938.

STATEMENT OF FACTS.

John W. Smith, 618 Jefferson Street, Joliet, Illinois, claims to have sustained a concussion of the brain and injuries to the left eye and the lumbar region of the back, on the 6th day of February, 1935, while employed as a janitor for the Illinois Emergency Relief Commission at the Will County Emergency Relief Office, located at 410 North Ottawa Street, Joliet, Illinois.

The Illinois Emergency Relief Commission was created by an Act of the General Assembly of the State of Illinois effective February 6, 1932. Chapter 23, Section 464, of the Illinois State Bar Statutes, 1935, sets out the duties of said Commission which are as follows:

"Powers and duties. It shall be the duty of the commission until March 1, 1937, to provide relief to residents of the State of Illinois, who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any other means deemed desirable by the commission. For the purpose of carrying out the provisions of this Act, the commission may make use of and co-operate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission has created many departments within itself since its creation through which relief is administered; such as maintenance department, furniture shops, mattress factories, canneries, work relief divisions and other divisions or departments too numerous to mention. Said maintenance department had charge of maintenance work in all buildings operated by the Illinois Emergency Relief Commission. Such work included plumbing, carpentry, janitor work, engineering, and general repair work. Said furniture shops manufactured furniture which is used in relief offices throughout the State. Said mattress factories manufactured mattresses for relief recipients and for shelters operated by the Illinois Emergency Relief Commission. Said canneries preserved vegetables and fruits which had been grown by relief recipients on Illinois Emergency Relief Commission soil. Said work relief divisions furnished men to the State Highway Department, counties, townships, cities and parks for general maintenance work. All of the above enterprises or projects used sharp-edged cutting tools such as saws, chisels, mattocks and axes. Said buildings operated electric motors, elevators, and boilers, all of which are governed by municipal ordinances.

John W. Smith was an administrative employee of the Illinois Emergency Relief Commission assigned to work at the Will County Emergency Relief office as a janitor. His duties were to fire and attend two Kewanee boilers and to assist with the general maintenance work throughout the building. On the day hereintofore mentioned, John W. Smith was making certain repairs on a ventilating door which was at the grade level of the building. In the course of the work, the derrick, which was attached at the side of the ventilator and used for hoisting ashes and debris from the basement to the street, gave way. John W. Smith was pitched fifteen feet to the concrete floor of the basement.

John W. Smith was found lying on the concrete floor beneath the ventilator in an unconscious condition by Charles Carr, who was also employed as a janitor by the Will County Emergency Relief office.

Mr. Carr informed the Illinois Emergency Relief Commission that on the day heretofore mentioned, he entered the boiler room at 12:00 noon. He found John W. Smith lying on the concrete floor, unconscious and bleeding from the nose and mouth. From all appearances, the accident had occurred just a few minutes before his arrival. Mr. Carr immediately notified Harry B. Harwood, administrator for the Will County Emergency Relief committee and in charge of all employees at that office. Mr. Harwood called an ambulance and made arrangements for John W. Smith's admittance to the St. Joseph's Hospital, Joliet, Illinois, and for Dr. D. W. Killinger to take charge of the case. John W. Smith remained in the hospital from the date of the accident until the 15th day of February, 1935. See Exhibit One.

Section 3, subsection 8, of the Workmen's Compensation Act of the State of Illinois provides:

*"In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra hazardous * * **"

Dr. Killinger discovered, while administering treatment, that John W. Smith had some disability in the left eye. Therefore, Dr. Raymond Brown, Eye Specialist, was called for consultation. See Exhibit Two.

John W. Smith's hospital and medical bills in the sum of One Hundred Twelve Dollars and Fifty Cents (\$112.50), have been paid by the Will County Emergency Relief Commission.

Section 8, Subsection (a) of the Workmen's Compensation Act of the State of Illinois provides:

*"The employer shall provide the necessary first aid medical and surgical services, and all necessary medical and surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury * * **"

John W. Smith's accident was in the course of, and arose out of his employment. Further, the Will County Emergency Relief Commission had notice of the accident and demand for compensation was made on his employer within six months after his injury.

John W. Smith claims temporary total disability for sixteen (16) weeks. The Illinois Emergency Relief Commission's records show that Dr. Raymond Brown attended John W. Smith until the 5th day of May, 1935.

Section 8, Subsection (c) of the Workmen's Compensation Act of the State of Illinois provides as follows:

"For injuries in the following schedule, the employee shall receive compensation for the period of temporary total incapacity for work resulting from such injury, in accordance with the provisions of paragraphs (a) and (b) of this section, for a period not to exceed sixty-four weeks, and shall receive in addition thereto compensation for a further period subject to limitations as to amounts as in this section provided, for the specific loss herein mentioned, as follows, but shall not receive any compensation for such injuries under any other provision of this Act."

John W. Smith had two children under sixteen years of age at the time of the accident.

An Illinois Emergency Relief Commission investigator discovered that on or about the 20th day of December, 1935, John W. Smith received employment with the Illinois Security Company as a janitor for one of their buildings; that while employed by said company he sustained an accidental injury to his head on the 28th day of December, 1935, and as a result of his injury he collected thirteen (13) weeks temporary total disability. See Exhibit Three.

John W. Smith filed a petition in the Court of Claims which is known as: *J. W. Smith vs. State of Illinois*, No. 2718. A release has been filed in the Court of Claims asking that the above claim be dismissed as John W. Smith and his attorney have agreed to accept Fifty Dollars (\$50.00) in full settlement for his injuries.

EXHIBIT I.

March 13, 1935.

Case No. 366

Room 324

Patient—John Smith

Address—618 E. Jefferson St.

Age—37 years

Occupation—paper hanger and decorator

Case No. 675—Concussion of brain in 1920.

Case No. 914—Appendectomy date—4/16/20

Case No. 4028—Gas—Asphyxiation date—11/30/33

Case No. 3223—Concussion of head injury to Vertebrae date—10/30/35

Admission—2/6/35 Time—12:30 A. M.

Discharged—2/16/35

Accident—Medical—Concussion of brain formed from fall which caused a blow to the head.

Result—Improved.

X-Ray Report—2/8/35

Films of skull were negative for fracture or other demonstrable cranial pathology.

Films of lumbo-dorsal spine disclosed no demonstrable fracture or dislocation. No demonstrable thoracic pathology or fractured ribs could be shown.

signed DR. L. S. TICHY.

Report from Dr. Raymond Brown on the condition of the eyes.

Pupils eyes react sluggishly. Vision blurred in left eye. Left disc has markedly blurred edges—probable concus. Right disc normal.

EXHIBIT TWO

I. E. R. C.

PHYSICIAN'S REPORT.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 35.

Report immediately in duplicate to the local county Work Relief Superintendent.

Important Note: Major operations, unless imperative must not be performed without first informing the County Emergency Relief Committee, in order to give them an opportunity to participate in arrangements for hospital and other expense, also to furnish medical and surgical consultation if deemed necessary.

Important: In describing injuries, please complete chart on reverse side and observe the following instructions:

Amputation relating to Hands and Feet—Specify by surgical name the number of every entire joint and portion of joint that is lost, including carpal, metacarpal, tarsal, and metatarsal articulations, if any involved using the terms, "thumb, first, second, third, and fourth finger, great toe, first, second, third, and fourth toes," and whether on right or left member.

Contusions—Single or multiple, superficial or deep, with locations, complications, etc.

Fractures—Give names of the bones and location; whether simple, double, compound, comminuted and complications or dislocations, with joints involved.

Lacerations and Cuts—Location, single or multiple, extent, number of sutures, required, muscle, nerves, blood vessels involved, if any.

Hernia—Describe whether direct, indirect, inguinal, femoral, umbilical or congenital type, and right or left side or both.

SPECIALLY IMPORTANT.

In case of injuries to the Eye, Hernia, Fractures, Internal Injuries and all other cases requiring operative surgery, it is imperative that you first telephone the County Work Relief Superintendent for instructions, giving your opinion of the necessity for same.

Use X-ray when necessary.

Name of Injured Worker **Smith W. John**
Print, correct spelling absolutely necessary (Last Name) (Middle Name) (First Name)
 Residence Address **618 E. Jefferson Street Joliet Will**
(Street and Number) (City or Village) (County)
 Age: 36. Sex: Male. Single.....Married: Yes. No. of Children: 1
 Project No. Administrative..... Employment Agency: W. E. R. C.
(This information is shown on Notice of Assignment slip, which Client must always have with him.)
 At Whose Request Did You Take Care of This Case? **St. Joseph's Hospital**
(This information is absolutely necessary)

Date and Time of Your

First Examination: **Wednesday February 6th 1935 at 12:30 P. M.**
(Day of Week) (Month) (Date) (Year) (Time)

Where Was the Examination Made? **St. Joseph's Hospital, Joliet, Illinois**

Injuries consist of?—Contusions to head and back. Nasal hemorrhage. Possible skull fracture. Concussion of brain.

When, in your opinion, were these injuries sustained?—Feb. 6th, 1935.

By what means, in your opinion, were these injuries sustained?—Fall from ladder at work, for W. E. R. C.

Have you observed any physical impairment not the result of the above injuries? If so, what?—No.

Explain fully medical or surgical procedure or treatment up to and including this date—X-ray of head, following first aid treatment, laboratory examination and hospital care.

To what date do you deem further treatment necessary? Describe character and frequency—Daily hospital calls to February 15th. Eye examination by eye specialist—possible spinal puncture and X-ray of spine.

How many days, in your opinion, should injured lose from date of accident before he can resume his regular work?—Two weeks.

In your opinion, will the injuries result in death, loss of limb, sight, or any impairment of function? Explain fully—Not as far as I can tell at this time.

Date of this report—February 7th, 1935.

Signed—D. W. Hillinger, M. D. Telephone 2-0975.

Address **204 N. Scott Street Joliet Will**
(Street and Number) (City) (County)

Please Send This Report to the County Work Relief Superintendent, immediately.

EXHIBIT THREE.

February 7, 1936

Mr. William Behringer, Joliet, Illinois, employed by the Illinois Security Company, was interviewed because Mr. John Smith, who has a claim now pending before the Court of Claims, is also receiving compensation from the Illinois Security Company because of an injury he sustained while working for them as a janitor in one of their buildings. At this date, Mr. Smith is receiving \$11.00 a week for compensation. Said sum has been paid since December 28, 1935 and probably will continue for the next three weeks.

Mr. Behringer further stated that on two previous occasions when Mr. Smith was employed by them as janitor, he had sustained injuries but that no compensation was paid him. On these previous occasions only medical bills and salary were paid during the time of his disability.

ADVISORY OPINION BY MR. JUSTICE YANTIS.

To the Illinois Emergency Relief Commission:

Pursuant to your request for an Advisory Opinion, based upon the attached statement of facts submitted by you, in the above matter, an Advisory Opinion is hereby rendered, based upon said statement:

Such statement of facts contains the usual recital as to the creation of said Illinois Emergency Relief Commission, and of the powers and duties; also an account of the departments organized and created within itself and of the various activities carried on pursuant thereto. Claimant, John W. Smith, is shown to have been an employee of said Commission, assigned to work at the Will County Emergency Relief Office at 410 N. Ottawa Street, Joliet, Illinois, as a janitor. His duties were to fire and to take care of two boilers and to assist with the general maintenance work throughout the building. On February 6, 1935, while the employee was making certain repairs on a ventilating door at the grade level of the building, a derrick which was attached at the side of the ventilator and used for hoisting ashes and debris from the basement to the street, gave way and the employee was pitched fifteen feet to the concrete floor of the basement. He was knocked unconscious and had bleeding and hemorrhage from the nose and mouth. The Relief Administrator for the County was immediately notified and called an ambulance and arranged for the patient's admission to St. Joseph's Hospital in Joliet, where he received treatment until the 15th day of February, 1935. He thereafter remained under the care of Dr. Raymond Brown, an eye specialist, who was called into the case at the hospital, until the 5th day of May, 1935. Claimant had two children under the age of sixteen years at the time of the accident, and the statement discloses that his hospital and medical bills in the sum of One Hundred Twelve and 50/100 (\$112.50) Dollars have been paid by the Will County Emergency Relief Commission; that he claims temporary total disability for a period of sixteen (16) weeks and has a claim pending in this court entitled *J. W. Smith vs. State of Illinois*, C. of C., No. 2718; further, that claimant through his Attorney has agreed to accept Fifty (\$50.00) Dollars as settlement in full for any sums due him growing out of said accident. The statement does not disclose at what

wages he was employed, but on the settlement proposed the amount to be paid him would be within the minimum basis of Seven and 50/100 (\$7.50) Dollars per week, so the wage rate is immaterial.

From a consideration of the statement we find that same discloses that at the time of the accident both employer and employee were operating under and bound by the provisions of the Workmen's Compensation Act; that claimant's accident arose out of and in the course of his employment; that notice and demand for compensation were made within the requirements of said Act; that the proposed settlement of Fifty (\$50.00) Dollars is within the limit to which claimant would be entitled under the terms of said Act for temporary total disability as shown herein. We are therefore of the opinion that settlement with claimant is proper in the sum of Fifty (\$50.00) Dollars, in full satisfaction of all demands arising out of the accident in question. In making settlement the following conditions should be observed: First, that the claim of *J. W. Smith vs. State of Illinois*, C. of C., No. 2718, now pending in the Court of Claims should be dismissed and Second, that payment of the above compensation shall be made by the Illinois Emergency Relief Commission out of any funds held by it and allocated for the payment of such claims.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 35.

Settlement of claim for \$750.00, justified and found advisable.

JAMES O. WORTHLEY, Claimant *vs.* ILLINOIS EMERGENCY RELIEF
COMMISSION, Respondent.

Opinion filed January 11, 1939.

STATEMENT OF FACTS.

James O. Worthley, 1048 West Monroe Street, Chicago, Illinois, claims to have sustained an injury to his left hand on the 30th day of October, 1934 while working as a night cook in the shelter at 1210 South Morgan Street, Chicago, Illinois. Said shelter was operated by the Illinois Emergency Relief Commission.

The General Assembly of the State of Illinois on or about the 6th day of February, 1932, created the Illinois Emergency

Relief Commission. Chapter 23, Section 464, of the Illinois Revised Statutes, 1935 Edition sets out the duties of said commission, which are as follows:

"Powers and duties. It shall be the duty of the commission until March 1, 1937, to provide relief to residents of the State of Illinois, who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any other means deemed desirable by the commission. For the purpose of carrying out the provisions of this Act, the commission may make use of and co-operate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission created many departments within itself since its creation through which relief was administered; such as maintenance department, furniture shops, mattress factories, canneries, work relief divisions and other divisions or departments too numerous to mention. Said maintenance department had charge of maintenance work in all buildings operated by the Illinois Emergency Relief Commission. Said work included carpentry, plumbing, janitor work, engineering, and general repair work. Said furniture shops manufactured furniture which is used in relief offices throughout the State. Said mattress factories manufactured mattresses for relief recipients and for shelters operated by the Illinois Emergency Relief Commission. Said canneries preserved vegetables and fruits which had been grown by relief recipients on Illinois Emergency Relief Commission soil. Said work relief divisions furnished men to the State Highway Department, counties, townships, cities and parks for general maintenance work. Said shelters were operated by the said commission for the benefit of transient men. These men were furnished two meals a day and shelter and some had opportunity to work around the building doing odd jobs. All of the above enterprises or projects used sharp-edged cutting tools, such as saws, chisels, mattocks and axes. Said buildings operated electric motors, elevators and boilers, all of which were governed by municipal ordinances.

James O. Worthey was working as a night cook in the kitchen of the shelter at 1210 South Morgan Street, on the day heretofore mentioned, when in the process of preparing a meal for the relief recipients, Mr. Worthey started an electrical grinder to grind a peck of Bermuda onions. After three

or four onions had been placed in the grinder, his left hand became entangled in the blades of the grinder. As a result of this all fingers of the hand were cut and torn, some of them being amputated by the machine. Immediately after the accident, James O. Worthley was rushed to the Cook County Hospital where Dr. Shinghman examined him. Records show that Mr. Worthley had been brought to the hospital by a police ambulance which had been summoned by attendants at the relief shelter. Medical records at Cook County Hospital show that the diagnosis was "Traumatic amputation of the fingers of left hand" which had been caused by the hand being caught in the electrical grinder.

Medical report which was submitted by Dr. Nathaniel H. Adams on the 15th day of July, 1935, shows that James O. Worthley's index finger was amputated in the distal third of the middle joint and the second, third and little fingers were amputated at the middle joints; that James O. Worthley has lost the industrial use of the index, second, third and little fingers; and that there is considerable wasting of the muscles of the forearm due to the amputation of these fingers. (See Exhibit I.)

James O. Worthley was referred to Dr. Hollis E. Potter on the 31st day of March, 1938, for X-ray pictures of the left and right hands. Reports of said pictures were made by Dr. Potter at the time the X-ray films were developed. (See Exhibit II.) Said X-ray pictures and reports were shown to arbitrators Anton Johannsen and Joseph L. Lisack of the Industrial Commission. Said arbitrators were of the opinion that James O. Worthley had lost the industrial use of the first, second, third, and fourth fingers of the left hand.

Mr. William Johnson, on the day heretofore mentioned, was employed as a cook's helper at the shelter, and at the time of the accident, he had left the kitchen and gone to the cooling room. Said room adjoins the kitchen. When he returned from that room, he found James O. Worthley holding his left hand which was bleeding profusely and complaining of great pain. Mr. Johnson immediately notified other workers about the shelter who notified the police and made arrangements to have Mr. Worthley taken to the Cook County Hospital for treatment. (See Exhibit III.)

James O. Worthley had been employed at the shelter since the 19th day of January, 1934. From the time he was ad-

mitted into the shelter to the date of the accident, he had been detailed to different positions within the shelter, but that on the 17th day of October, he became night cook and his rate of pay for said service was \$5.00 per week and maintenance. Maintenance consisted of two meals per day and lodging. The Illinois Emergency Relief Commission feels that the cost of maintenance for an individual in a shelter is \$9.00 per month. Therefore, James O. Worthley's earning at the time of the accident were \$29.00 per month.

James O. Worthley's accident arose out of and in the course of his employment. Further, the Illinois Emergency Relief Commission had notice of the accident and demand for compensation was made on his employer within six months after the accident.

In the course of James O. Worthley's employment, sharp-edged tools such as knives, cleavers, etc., and electrically driven motors which operated grinders, meat slicers, etc., were used. There were also two boilers in the building. Said building was operated by the Illinois Emergency Relief Commission and was occupied by approximately fourteen thousand men.

Section 3, Subsection 8, of the Workmen's Compensation Act of the State of Illinois provides:

"In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises, or businesses are hereby declared to be extra hazardous * * *

Section 8, subsection (a), of the Workmen's Compensation Act of the State of Illinois provides:

"The employer shall provide the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury * * *

Section 8, subsection (e), of the Workmen's Compensation Act of the State of Illinois provides:

"For injuries in the following schedule, the employee shall receive compensation for the period of temporary total incapacity for work resulting from such injury, in accordance with the provisions of paragraph (a) and (b) of this section, for a period not to exceed sixty-four weeks, and shall receive in addition thereto compensation for a further period subject to limitations as to amounts as in this section provided, for the specific loss herein mentioned, as follows, but shall not receive any compensation for such injuries under any other provision of this Act."

Section 8, subsection 2, of the Workmen's Compensation Act of the State of Illinois provides:

"For the loss of a first finger, commonly called the index finger, or the permanent and complete loss of its use, fifty percentum of the average weekly wage during forty weeks."

Section 8, subsection 3, of the Workmen's Compensation Act of the State of Illinois provides:

"For the loss of the second finger, or the permanent and complete loss of its use, fifty percentum of the average weekly wage during thirty-five weeks."

Section 8, subsection 4, of the Workmen's Compensation Act of the State of Illinois provides:

"For the loss of the third finger, or the permanent and complete loss of its use, fifty percentum of the average weekly wage during twenty-five weeks."

Section 8, subsection 5, of the Workmen's Compensation Act of the State of Illinois provides:

"For the loss of a fourth finger, commonly called the little finger, or the permanent and complete loss of its use, fifty percentum of the average weekly wage during twenty weeks."

At the time of the accident, James O. Worthey had no children under sixteen years of age.

James O. Worthey has filed a petition in the Court of Claims which is known as *James O. Worthey vs. State of Illinois*, No. 2536.

James O. Worthey is not asking for temporary total disability.

A release and waiver has been secured from James O. Worthey in which he and his attorney have agreed to dismiss the case now pending in the Court of Claims upon the payment of Seven Hundred Dollars (\$700.00).

EXHIBIT I.

July 15, 1935.

Mr. James H. Turner,
160 North LaSalle St.,
Chicago, Illinois.

Re: James O. Worthey vs. Illinois Emergency Relief.

DEAR SIR: Mr. Worthey, 1149 Monroe Street, was injured October 30, 1934. On that date he got his left hand into an electric meat grinder, and has lost the industrial use of the fingers of the hand.

The index finger was amputated in the distal third of the middle joint and the second, third and little fingers were amputated at the middle joints.

He has lost the industrial use of the index, second, third and little fingers.

There is considerable wasting of the muscles of the forearm due to the amputation of these fingers.

Yours very truly,

(Signed) NATHANIAL H. ADAMS.

NHA:K

EXHIBIT II.

HOLLIS E. POTTER, M. D.
1414 Peoples Gas Bldg.
Chicago

March 31, 1938.

Case of Mr. James O. Worthey

Mr. James O. Worthey was here for certain x-rays of his left hand. A film was made through the right for comparison.

The bones of the left thumb appear intact. In the index finger there was amputation at the middle of middle phalanx. At middle finger there was amputation near the outer end of proximal phalanx. There is loss of bone of nearly half an inch in this proximal phalanx. In the ring finger there was disarticulation at junction of middle and proximal phalanges so that there is no loss in length of proximal phalanx. In little finger there was amputation at mid point of middle phalanx. More than half of this phalanx remains. The presenting portion of each stump shows smooth bone of normal integrity. The soft tissue pad is a little thin at the little finger but quite ample at others.

Yours very truly,

(Signed) HOLLIS E. POTTER.

HEP:MAS

EXHIBIT III.

STATEMENT

William Johnson, 1210 South Morgan Street, does hereby state that on October 31, 1934, he was employed as a cook's helper in the kitchen at the above address, and that he was in the kitchen when James O. Worthey sustained certain injuries.

Mr. Johnson further states that on date aforesaid, he was working in the kitchen as a cook's helper and that his kitchen duties were to wash the pots and pans and do odd jobs around the kitchen, that just before Mr. Worthey started the electrical grinder, he stepped into the cooling room, said room adjoins the kitchen, and that while he was there, Mr. Worthey was injured. One of the other workers in the kitchen notified him of said accident. He immediately went to Mr. Worthey and saw his left hand bleeding profusely, then Mr. Worthey went directly to the doctor's office, which is located on the first floor.

Mr. Johnson further states that all he knows about the accident is what Mr. Worthey told him, as he was not an eye witness. Mr. Johnson also states that the wooden tamper or mallet which is generally used to force food through the grinder, was not used at this time, and the failure to use the wooden tamper was the direct cause of said injury.

(Signed) WILLIAM JOHNSON.

ADVISORY OPINION BY MR. JUSTICE YANTIS.

To the Illinois Emergency Relief Commission:

Pursuant to your request for an Advisory Opinion, based upon the attached statement of facts submitted by you in the matter of the claim of *James O. Worthey vs. Illinois Emergency Relief Commission*, the following Opinion is rendered, based upon the aforementioned statement:

It appears that James O. Worthey was employed as a night cook in the shelter at 1210 S. Morgan Street, Chicago, Illinois, and that this shelter was operated by your commission; further, that while preparing a meal for the relief recipients, Mr. Worthey started an electrical grinder to grind a peck of onions; that in doing so his left hand became entangled in the blades of the grinder and as a result, the four fingers of the hand were severely cut and torn. He was rushed to the Cook County Hospital where surgical aid was given. From the accident and the resulting surgery, it appears that Mr. Worthey's index finger was amputated in the distal third of the middle joint and the second, third and little fingers were amputated at the middle joints, and that said employee has lost the industrial use of these four fingers, and that there is considerable wasting of the muscles of the forearm due to the amputation of these fingers. It further appears that the X-ray pictures and hospital reports of this case were shown to Anton Johannsen and Joseph L. Lisack, of the Industrial Commission, and that they have indicated their opinion that the employee has lost the industrial use of the four fingers in question.

It further appears that claimant had been employed at the shelter since the 19th day of January, 1934. The accident in question occurred on the 30th day of October, 1934. He was paid for his services at the rate of \$5.00 per week and maintenance at the rate of \$9.00 per month, making his total rate of pay \$29.00 per month. Immediate notice of the accident was apparently had by the commission and a demand for compensation was made within six months after the accident. In the course of his employment sharp-edged tools and electrically-driven motors which operated grinders, meat-slicers, etc. were used, and it is apparent that the accident arose out of and in the course of plaintiff's employment, and that the acci-

dent in question is compensable under the terms of the Workmen's Compensation Act.

While claimant has filed a petition in the Court of Claims, entitled *James O. Worthey vs. State of Illinois*, C. of C., No. 2536, your statement is noted that he is not asking for temporary total disability, and that he and his attorney have agreed to dismiss said case upon payment of Seven Hundred (\$700.00) Dollars in full compensation for all rights incident to said injury.

Under the provisions of Sub-sections 2, 3, 4 and 5 of Section 8, Illinois Workmen's Compensation Act, claimant would be entitled to compensation for specific loss of the four fingers described, in an amount not less than the sum which he and his attorney offer to accept, and a settlement in the sum of Seven Hundred (\$700.00) Dollars by the commission is fully warranted and justified.

We are therefore of the opinion that claimant should receive settlement on said claim from the Illinois Emergency Relief Commission in the sum of Seven Hundred (\$700.00), and that such settlement should be subject to the following conditions, to-wit:

1. That the case of *James O. Worthey vs. State of Illinois*, Court of Claims No. 2536, now pending in this court should be dismissed.

2. That payment of the above compensation shall be made by the Illinois Emergency Relief Commission out of any funds held by it and allocated for the payment of such claims.

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